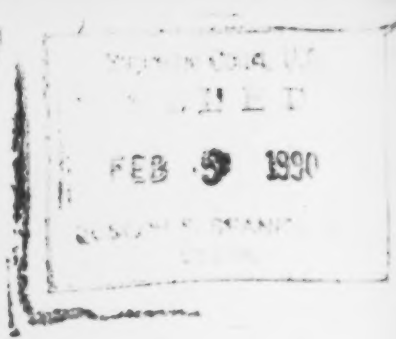


89-1808



No. 89-_____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

ROGER P. WILHELM, et al.

Petitioner,

v.

FIRST NATIONAL BANK &
TRUST COMPANY, et al.

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

Roger P. Wilhelm
P. O. Box 922
Columbia, Missouri 65205
(314) 442-6134

87992

QUESTION PRESENTED

1. Did the Court of Appeals err in denying petitioners due process, provided persons by Amendment V of the United States Constitution, by entering judgment for defendants without giving plaintiffs the opportunity to present briefs and arguments on appeal when:

(i) the District Court expressly stated "some . . . issues are frivolous, others are not and, consequently, the court believes that appellants should have an opportunity to present the issues to the Eighth Circuit."

(ii) the petitioner lacked legal training, and legal knowledge of the procedure, rules and law; and erred through failing to meet a provision of legal rule(s) further, is without counsel, without funds to retain counsel, the court refused to appoint counsel and,

-ii-

when a pro se is up against an opponent with counsel on staff and in the courtroom against the pro se and further has afforded itself of not one (1) but, two (2) large law firms to represent the bank against the pro se;

(a) or if only some of the above given circumstances exist?

-iii-

CERTIFICATE REQUIRED BY RULE 14.1(b)
OF THE GENERAL RULES OF THE
UNITED STATES SUPREME COURT

The undersigned petitioner certifies
that the following listed parties
appeared upon the pleadings below:

I. As plaintiff (petitioner) herein:

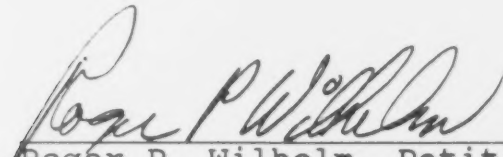
Roger Perry Wilhelm and

Mary Ellen Wilhelm

II. As defendants (respondents) herein:

First National Bank and Trust
Company; and

Larry R. Niedergerke, Trustee.



Roger P. Wilhelm, Petitioner

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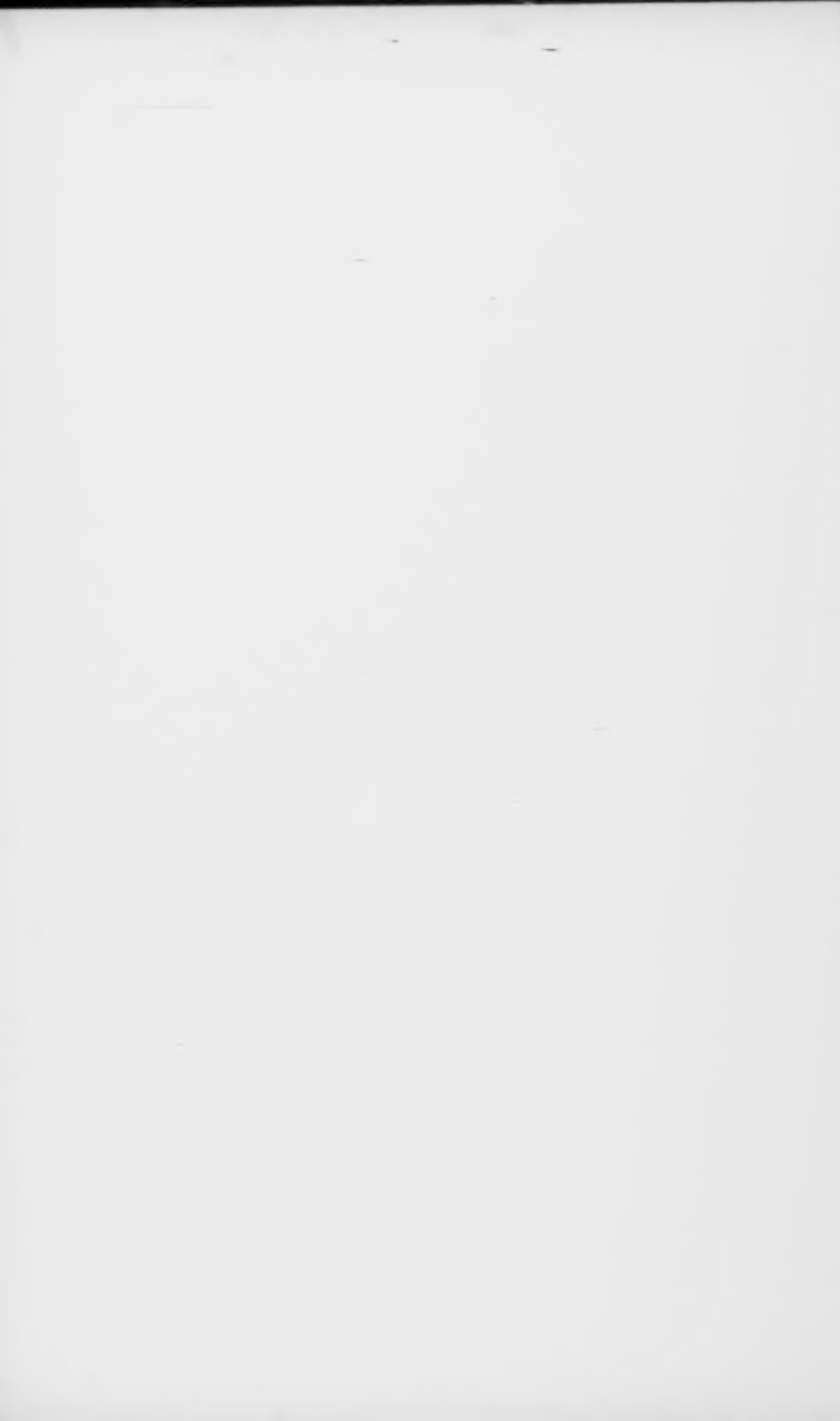
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No. 89-_____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ROGER P. WILHELM,

Petitioner,

v.

FIRST NATIONAL BANK &
TRUST COMPANY, et al.

Respondents,

INTRODUCTION

Roger Wilhelm hereby petitions this
Court for a writ of certiorari to the
Court of Appeals for the Eighth Circuit

OPINIONS BELOW

The Court of Appeals dismissed appellant's appeal by it's Order dated October 5, 1989, which appears in Appendix B, at 3a.

Appellant's petition for rehearing was denied by the Court of Appeals, Order dated November 7, 1989; while Appellant's Request To File Exhibit "A" In Camera has not been ruled on. The Order appears in Appendix A, at 1a.

The opinion and order of the District Court, dated May 19, 1989; and the order granting in forma pauperis appears in Appendix D, at 10a and Appendix C, at 5a, respectively.

The Bankruptcy Court's Findings of Fact, Conclusions of Law and Order on Defendants' Counterclaim, dated August 31, 1988; and Order denying plaintiffs' motion for new trial on defendant's counterclaim and denying plaintiffs' motion for the court to rescind the



summary judgment on plaintiffs' petition dated October 28, 1987 and order a trial on plaintiffs' petition, dated September 29, 1988 appears in Appendix F, at 24a and Appendix E, at 21a, respectively.

The District Court's Orders of May 19, 1988 ruling bankruptcy court's order for summary judgment in favor of defendants was not a final order; and order ruling plaintiffs notice of appeal which was treated as a motion for leave to appeal was untimely, appears in Appendix H, at 38a and Appendix G, at 34a, respectively.

The Bankruptcy Court's Findings of Fact, Conclusions of Law and Order on Defendants' Motion for Summary Judgment on Plaintiff's Petition, dated October 28, 1987, appears in Appendix I, at 40a.

The Order of U.S. District Court moving plaintiff's petition to the U.S. Bankruptcy Court appears in Appendix J, at 61a.

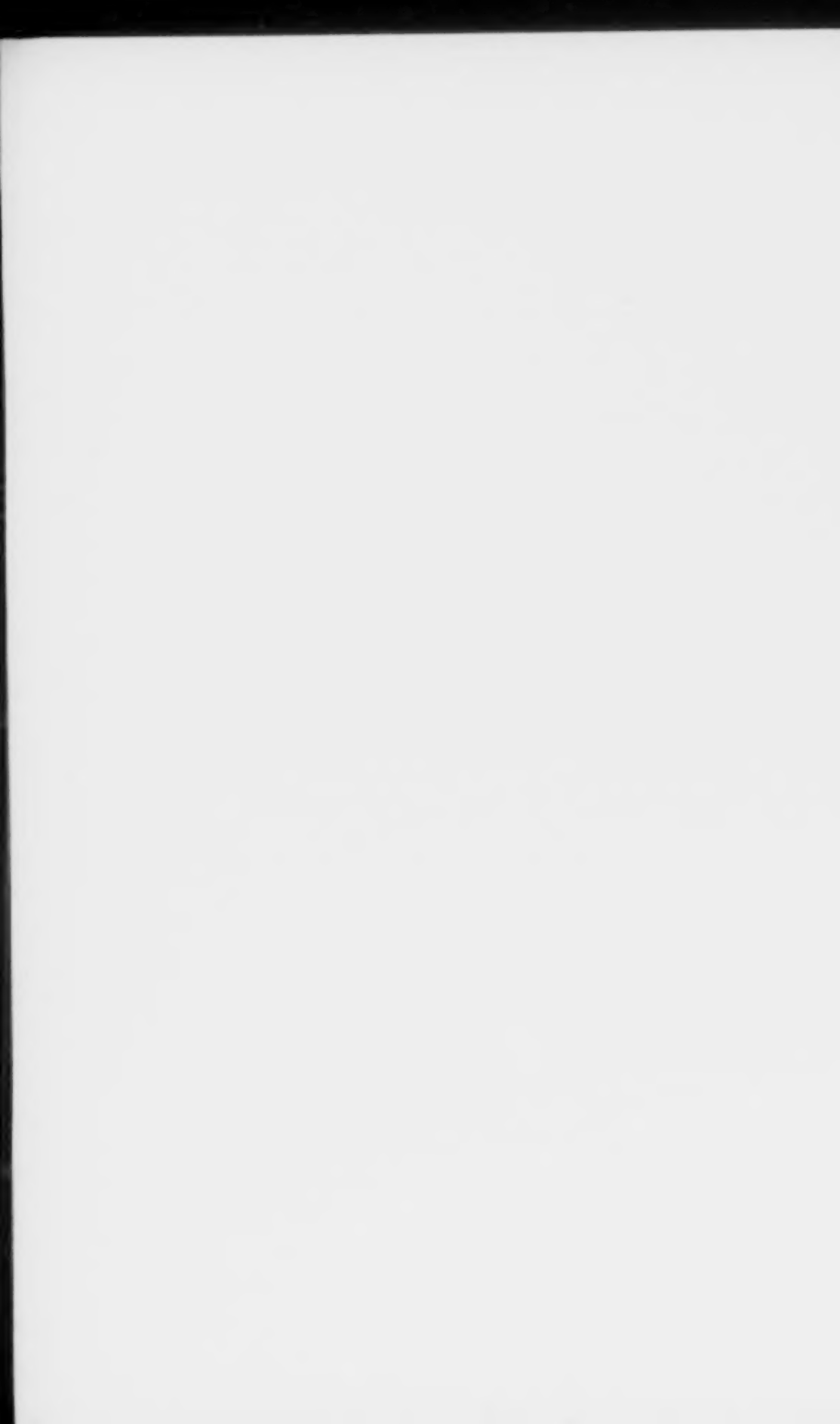
JURISDICTION

Jurisdiction over this petition obtains under Rule 13.1 of the Rules of this Court. Jurisdiction of the District Court was claimed under Title 11, 28 U.S.C. 1334.

CONSTITUTIONAL PROVISION AND STATUTES

INVOLVED

Petitioner's claims arose under Title 28, United States Code, Judiciary and Judicial Procedure (28 U.S.C., section 1654); and the United States Constitution, Amendment V. The relevant text is set forth in Appendix K, at 65a and 66a.

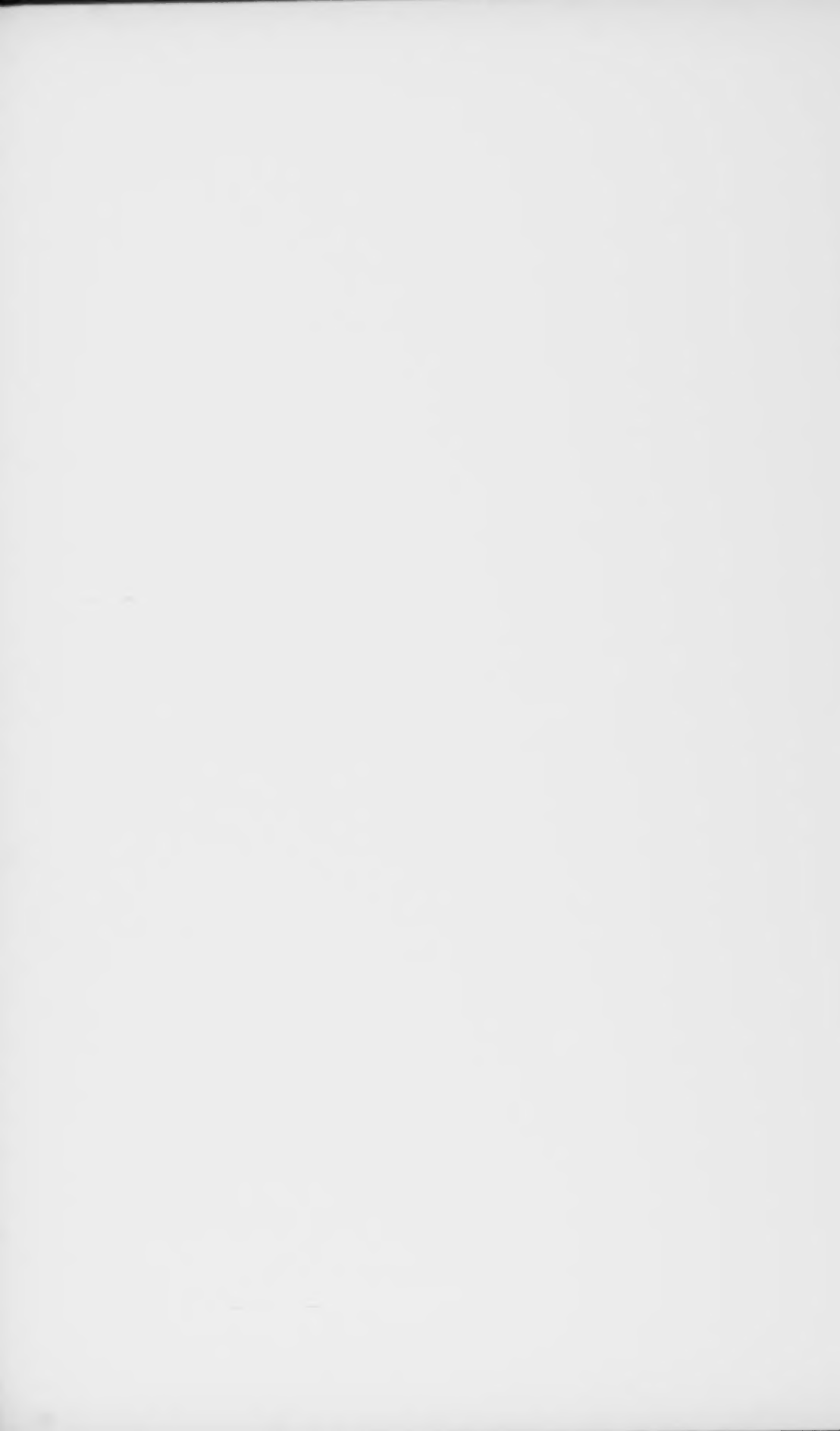


STATEMENT OF THE CASE

The history of this case is not truly reflected in any opinion contained herein. Suffice it to say petitioner has been wrongfully denied his right to due process. Some through petitioner Roger Wilhelm's lack of training in and knowledge of legal procedure and some through errors petitioner made.

After petitioner petition was transferred to the Bankruptcy Court the Bankruptcy Court issued a Protective Order on June 5, 1987 against petitioner restricting petitioners access to documents only created on or after October 8, 1987, approximately four months into the future. Such an order is unreasonable and too restrictive.

After denying petitioners' Application for Change of Judge, for which petitioners had good cause because the Bankruptcy Judge was biased and prejudice against petitioners from



earlier proceedings; the Bankruptcy Judge removed the trial setting on plaintiff's petition and indicated in that order that it intended to rule on respondent's Motion for Summary Judgment, which the Court did on October 28, 1987, see Appendix I, at 40a, and was issued undated. The only date on the document to indicate when it might have been issued was the file-stamp date provided by the clerk.

Not only did the Bankruptcy Court deny petitioner's motions, and discovery requests for preparation of the defendant's counterclaim, but the Bankruptcy Court struck most, if not all, motions and requests from the record. Again, the striking from the record was unnecessary and restrictive. Further, the Court issued an order Quashing a Subpoena of a witness imperative to petitioner's defense of respondent's counterclaim; and denied petitioner's

request for appointment of counsel.

It is true petitioners did not show up for the August 19, 1988 trial on respondent's counterclaim. Petitioner Roger Wilhelm was stopped and threatened on the morning of August 4, 1986 the last day of a previous trial of another case before the Bankruptcy Court; and in order not to expose Mary Ellen Wilhelm to any danger for this trial had not planned for her to attend. Approximately, two days before the trial I discovered if Mary Ellen Wilhelm did not attend the trial respondents would get a judgment against her, which would make my appearance at the trial moot.

On September 29, 1988 the Bankruptcy Court denied petitioner's motion for a new trial. See Appendix E, at 21a.

District Court

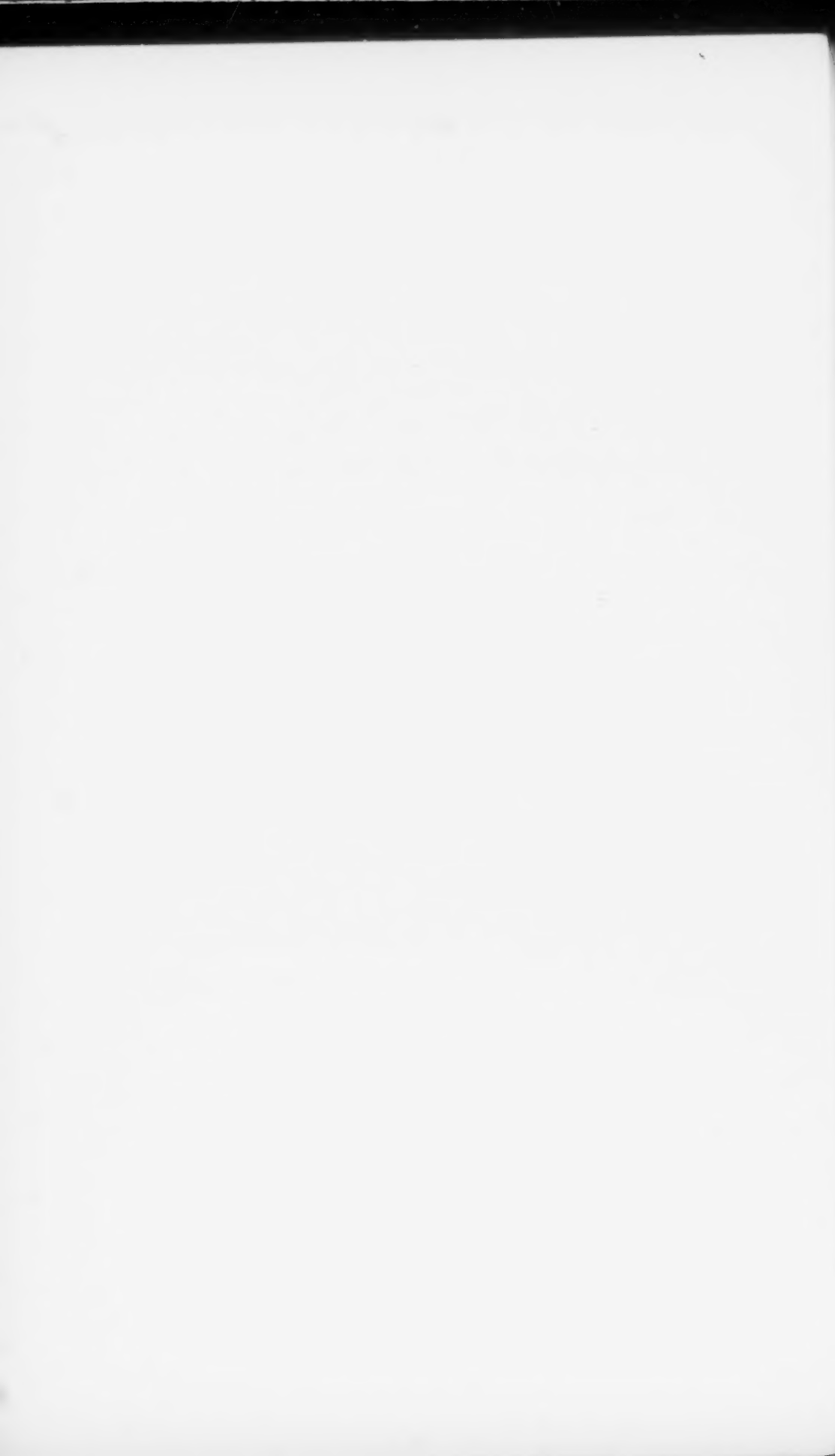
Petitioners appealed to the District Court. Petitioners were hindered in completing the designation of items to be



included in the record, because of surgery and petitioners were unable to obtain copies from respondents and petitioners' previous attorney because he had closed his file.

On November 18, 1988 the Bankruptcy Court issued an order giving petitioners 3 days to file the designation of record and statement of issues or until 5:00 p.m. November 21, 1988. This was unreasonable and burdensome because it required petitioners to travel to Kansas City to file the documents to ensure the filing deadline was met.

Petitioners had never prepared a brief and were unfamiliar with its preparation, on December 28, 1988 petitioners filed a Motion For Extension of Time to File Briefs. Unbeknownst, to petitioners it should have been filed on December 28, 1988. It was marked received on December 29, 1988, at 8:39 a.m. Had petitioners known it had to be



filed on December 28, petitioners would have driven to Kansas City, MO and filed the document, as they had in the past to meet a filing deadline. Again this is representative of petitioners lack of knowledge of legal procedure.

Petitioners had filed documents, including objections to respondents motion to dismiss the appeal, but the District did not rule on any, until four months later. Petitioners believes these motions should have been ruled on before proceeding with the preparation of briefs or any writ to remove the Bankruptcy Judge. Again, this was lack of knowledge of legal procedure.

Next petitioners erred when petitioners missed the deadline for filing a motion for rehearing by the District Court; and had no known alternative but to appeal to the United States Court of Appeals.

While the District Court's Order of

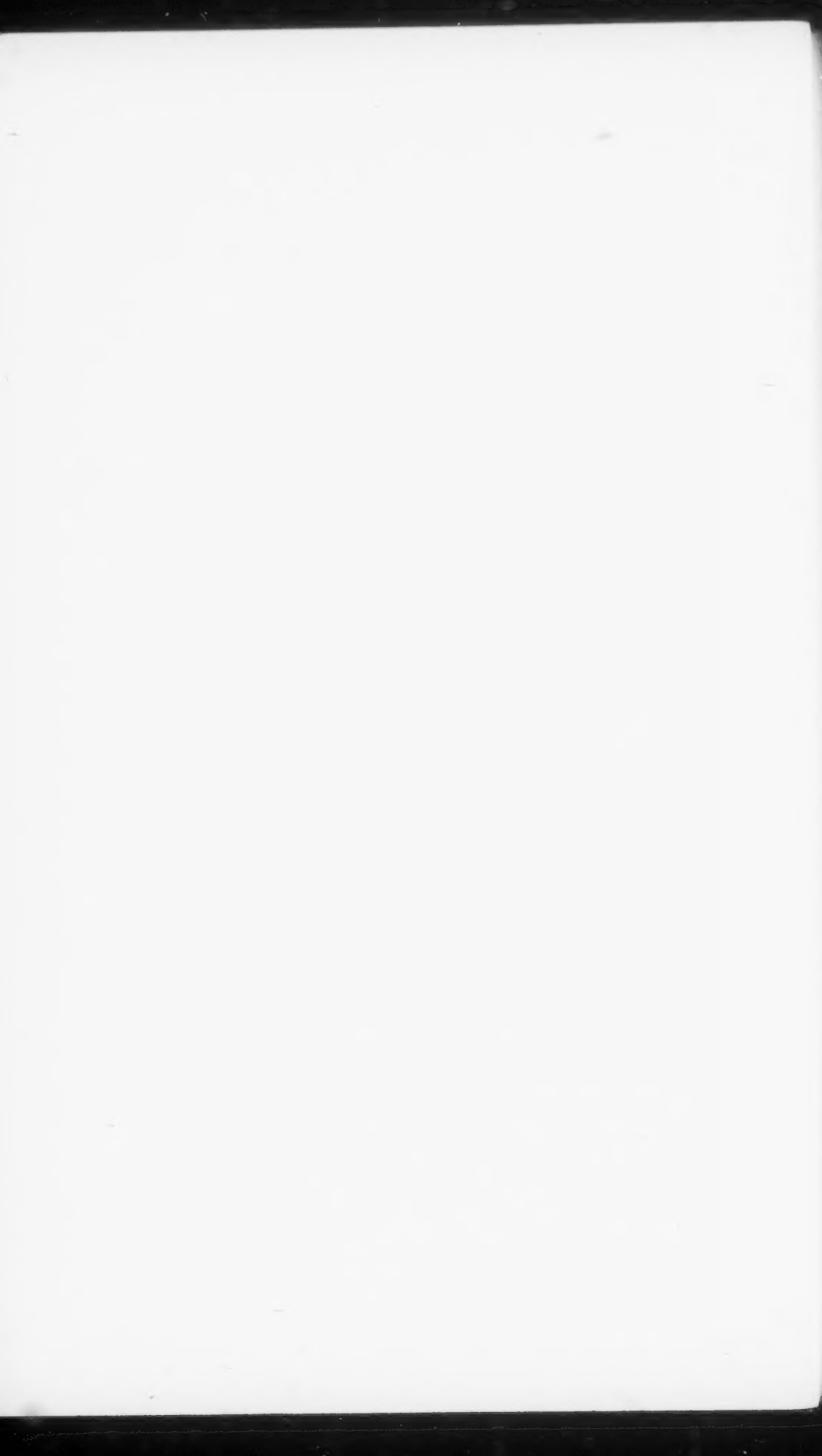
May 19, 1989 (Appendix D, 10a) is damaging to petitioners it is obvious the Court relied upon the Bankruptcy Court's Order, which was less than forthright and misleading.

After this petitioners filed a motion to proceed In Forma Pauperis and a motion to file Exhibit A In Camera. In Forma Pauperis was granted but Exhibit A was denied. See Appendix C, at 6a. Petitioners would like to bring attention to this Order and specifically pages 6a and the top paragraph on 7a, beginning with the paragraph "As noted in the . . .

United States Court of Appeals

The United States Court of Appeals dismissed our appeal without giving petitioners the benefit of presenting briefs and arguments. See Appendix B, at 4a.

Petitioners filed a petition for rehearing and a motion to file Exhibit A In Camera. The petition for rehearing

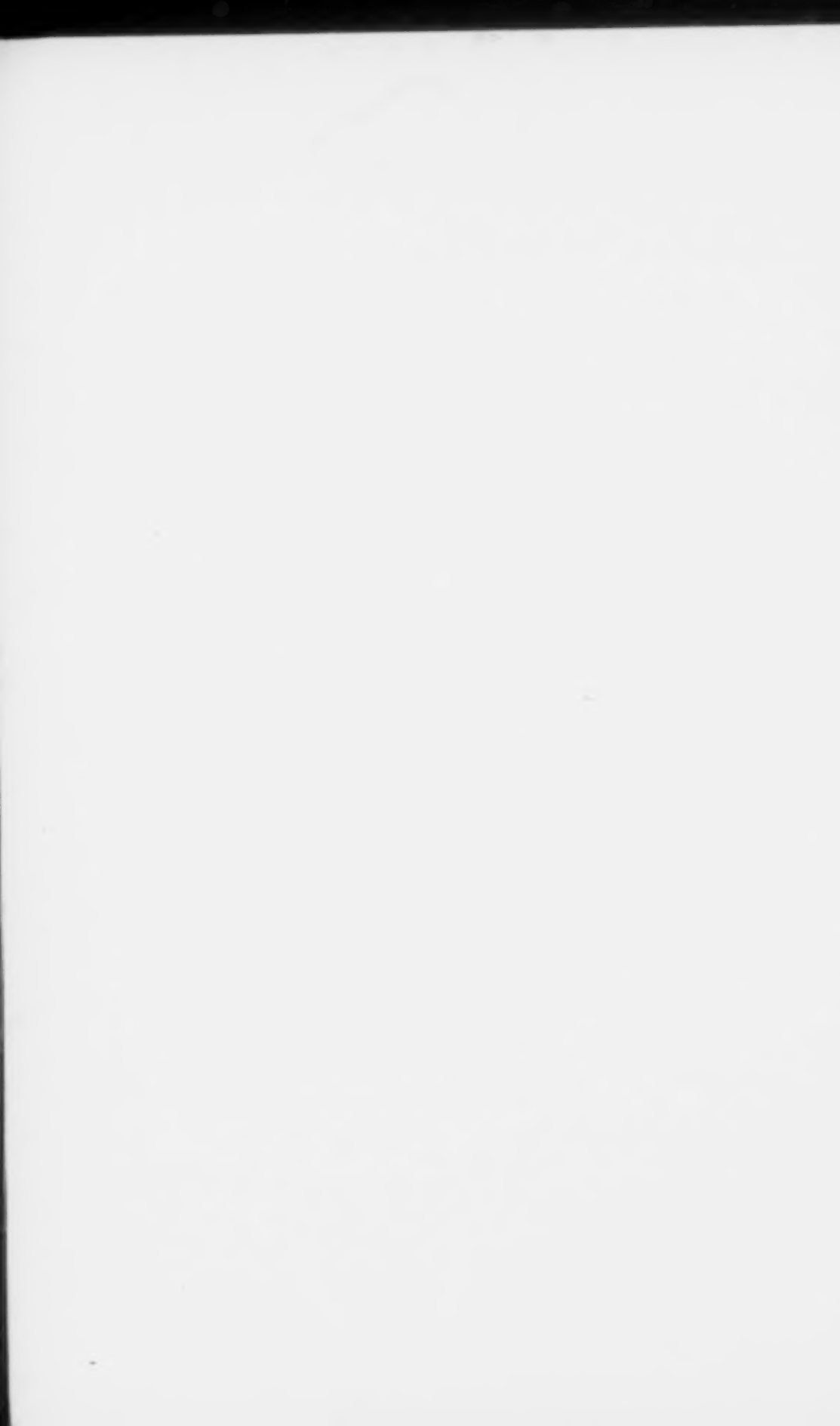


was denied and the motion to file Exhibit A In Camera has not been ruled on.

REASONS FOR GRANTING THE WRIT

1. Petitioners have been denied due process of law and should be allowed due process. The Fifth Amendment of United States Constitution provides all persons due process of law. See Appendix K at 64a.

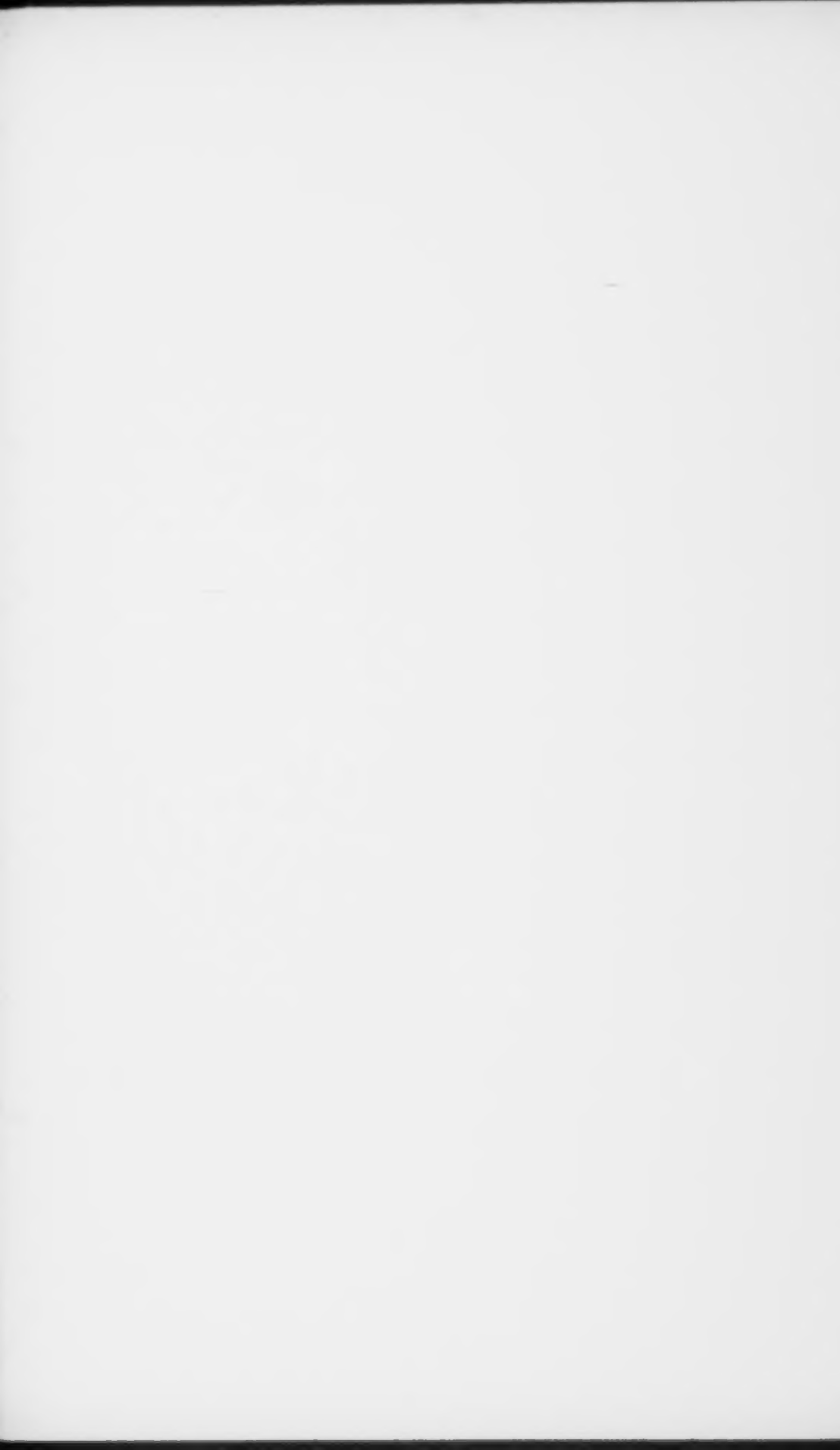
2. Petitioners have a right to be heard, which is guaranteed by the Constitution and reinforced by Statute. (U. S. Constitution, 5th Amendment; 28 USC Section 1654). See Appendix K at 64a and 65a. To this point in the proceedings of this case, that right has not been meaningfully exercised because of appellants lack of understanding of procedure in the courts. Our system of justice is based on an adversarial structure that relies upon knowledgeable parties on both sides of the controversy to focus, develop and present all



relevant facts and legal arguments to the court. The parties are not only assured the opportunity, but also bear the burden of doing so. Consequently, the system may work unfairly for those who are unable either to assert, effectively, legal rights on their own behalf or to hire a lawyer for that purpose. For this reason, many courts grant pro se litigants a degree of special consideration. (See *Traguth v. Zuck*, 710 F.2d 90; *Childs v. Duckworth*, 705 F.2d 915; *Mazur v. Com of Pa., Dept. of Transp.*, 507 F.Supp 3, affirmed 649 F.2d 860, certiorari denied 452 U.S.962; *Blair v. Maynard*, 324 S.E.2d 391).

3. Furthermore, petitioners, if given the opportunity, can prove their allegations. Some are afforded the opportunity the to offer their proof even if they can't prove their allegations. See *Haines v. Kerner*, 404 U.S.519).

4. This case presents to this Court

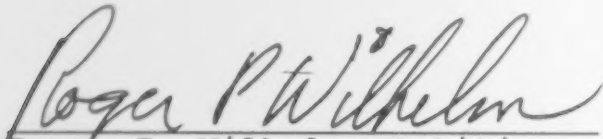


a situation where the District Court feels petitioners should be heard at the United States Court of Appeals. But, the United States Court of Appeals denied petitioners the opportunity to present briefs and arguments.

CONCLUSION

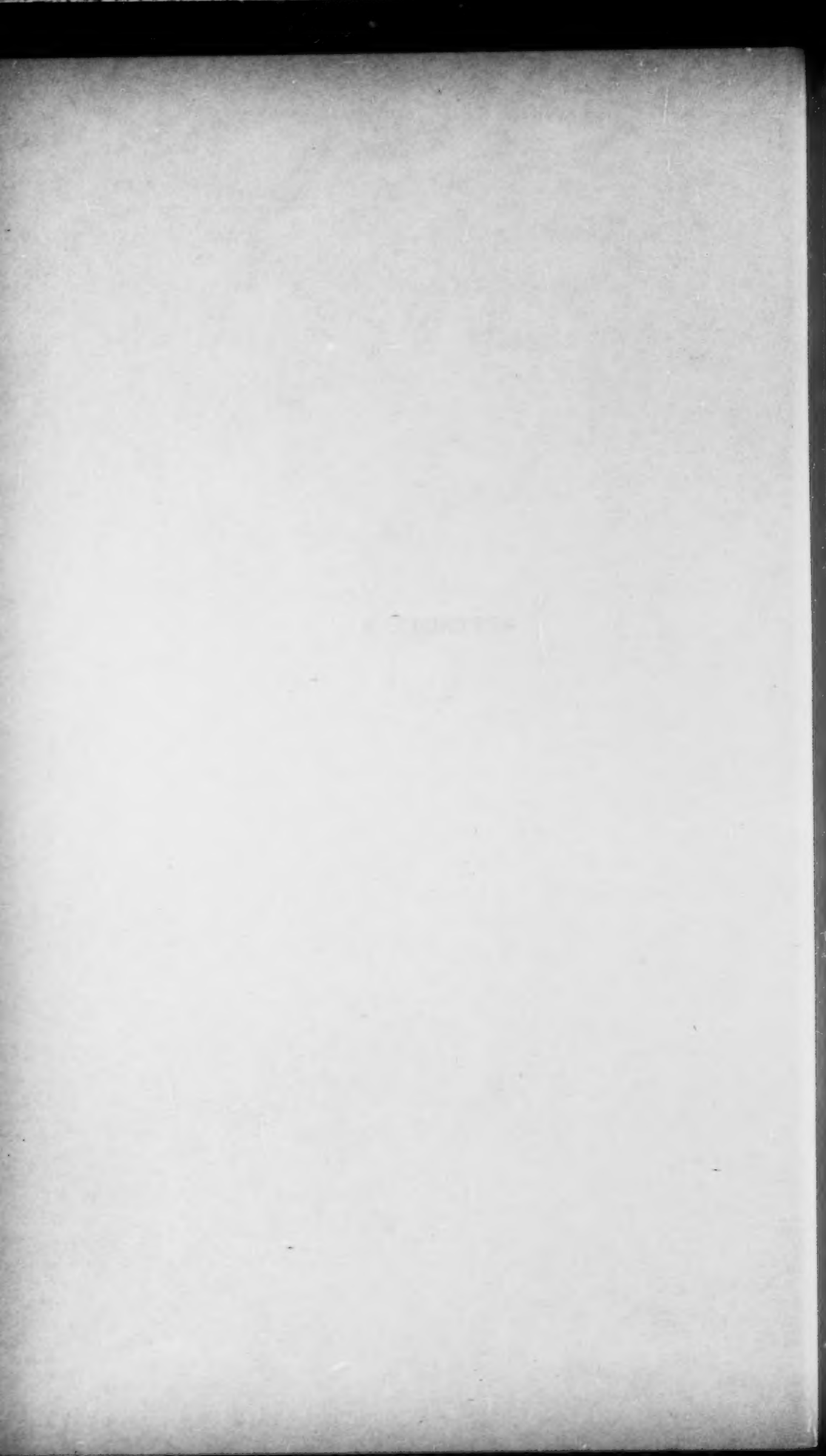
For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, reading "Roger P. Wilhelm". The signature is written in dark ink and is positioned above the typed name and address.

Roger P. Wilhelm, Petitioner
P. O. Box 922
Columbia, Missouri 65205
(314) 442-6134

APPENDIX A



UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2397WM

August, 1989

Filed November 7, 1989

ROGER P. WILHELM, et al.,

APPELLANTS,

v.

FIRST NATIONAL BANK &

TRUST COMPANY, et al.,

APPELLEES,

BEFORE: LAY, Chief Judge; McMILLIAN, AND
WOLLMAN, Cirucit Judges.



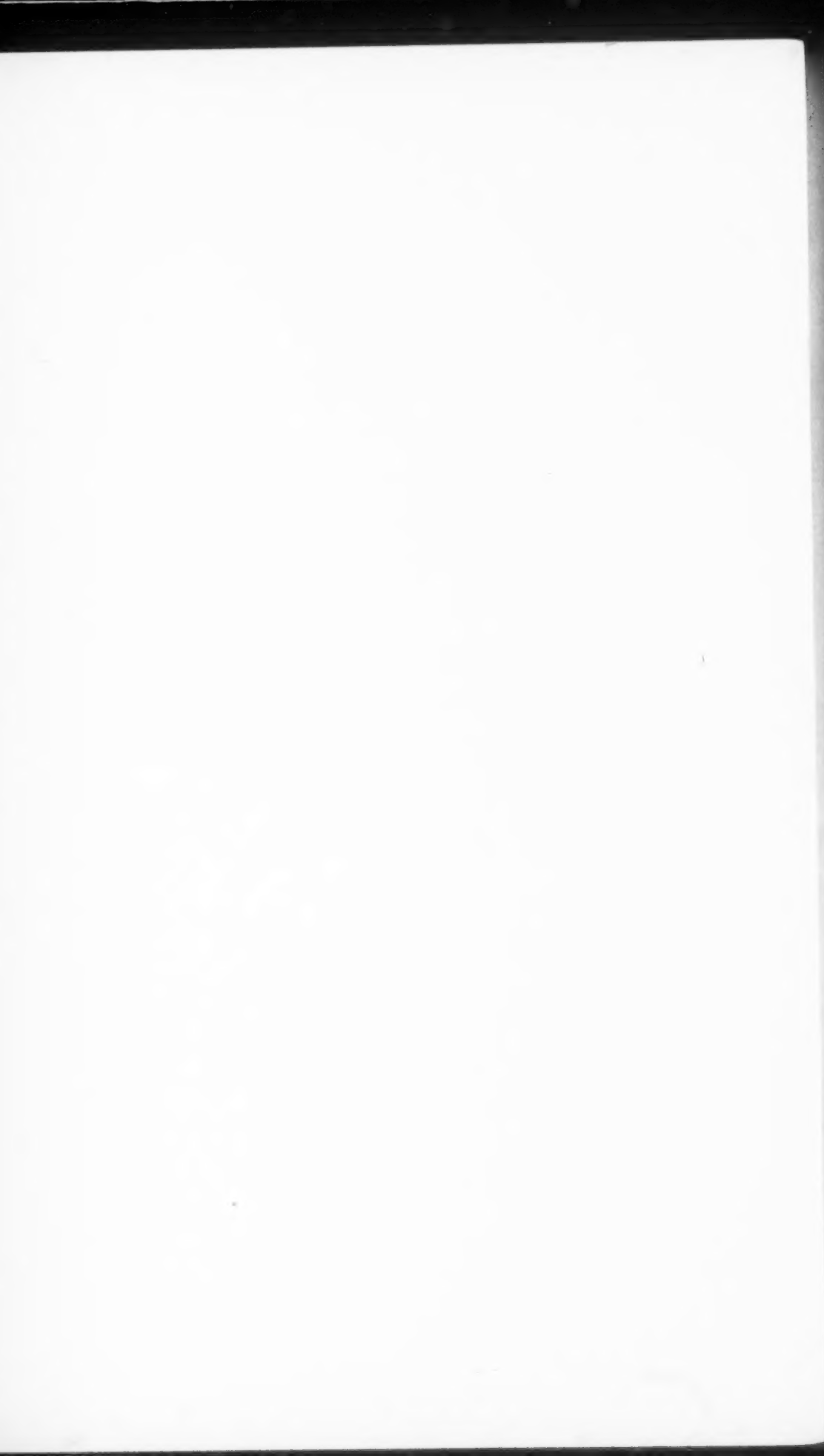
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ORDER

Appellants' pro se petition for rehearing
has been considered by the court and is
denied.

Order Entered at the Direction of the
Court:

By: _____/s/
Robert D. St. Vrain
Clerk



APPENDIX B



UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2397WM

August, 1989

Filed October 5, 1989

ROGER P. WILHELM, et al.,

APPELLANTS,

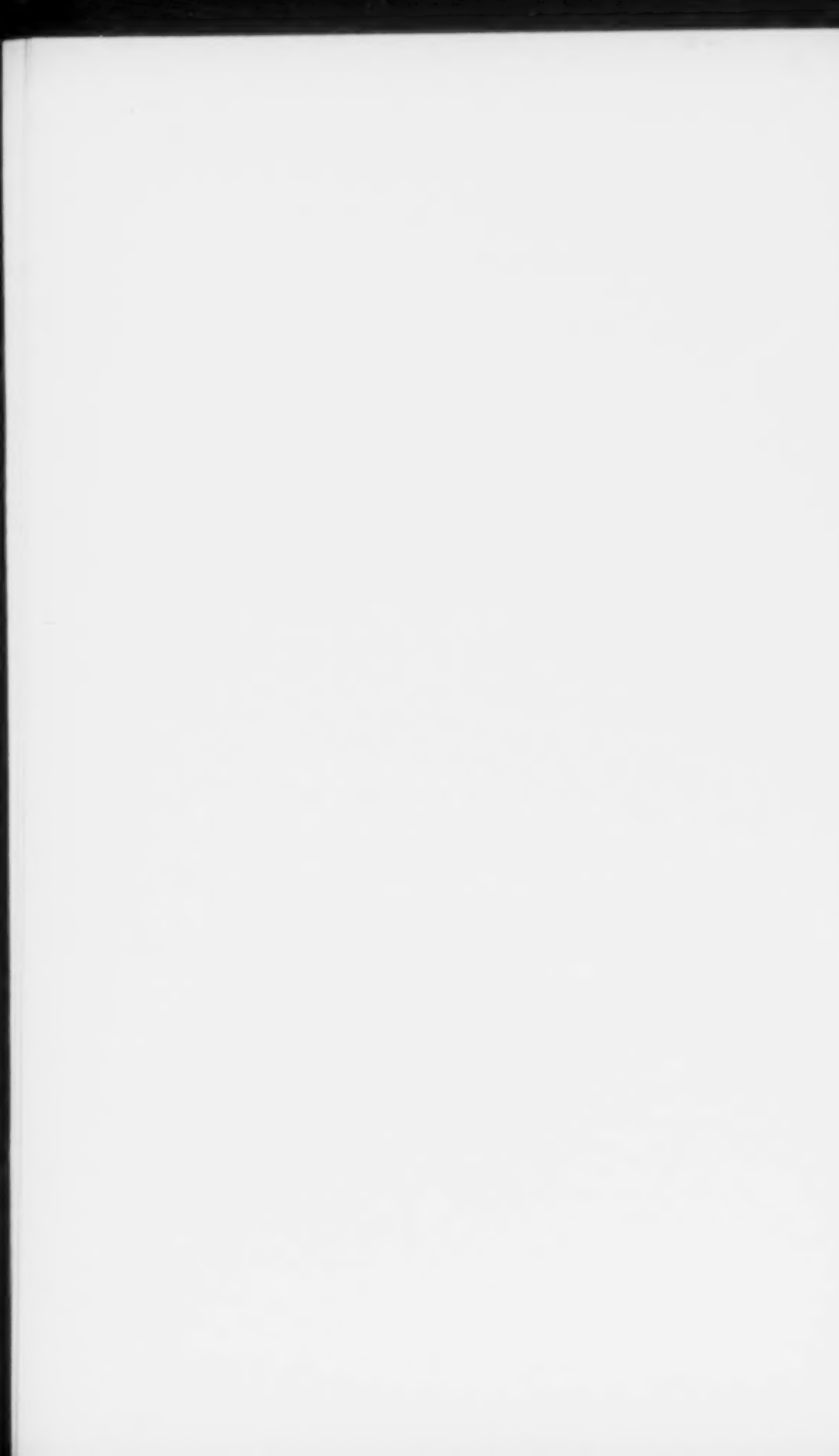
v.

FIRST NATIONAL BANK &

TRUST COMPANY, et al.,

APPELLEES,

BEFORE: LAY, Chief Judge; McMILLIAN, AND
WOLLMAN, Circuit Judges.



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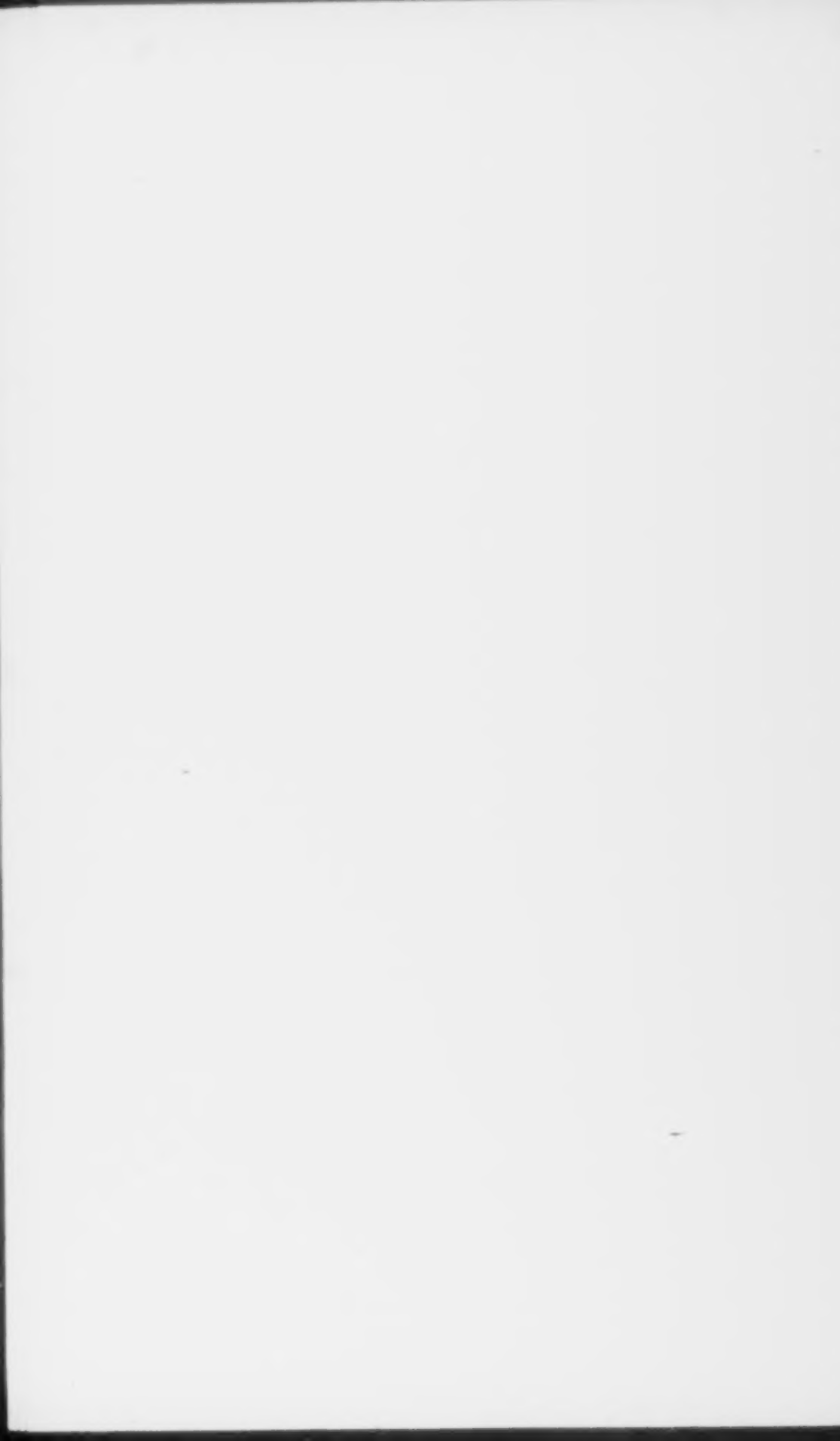
ORDER

Appellant's motion for preparation of the transcript at government expense is hereby denied. The record makes it clear that the district court did not abuse its discretion; therefore, the appeal is dismissed as frivolous.

A true copy.

ATTEST:

By: _____/s/
Robert D. St. Vrain
Clerk



APPENDIX C



UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 84-01614-C-11

No. 88-1229-CV-W-8 Filed September 7, 1989

ROGER P. WILHELM, et al.,

APPELLANTS,

v.

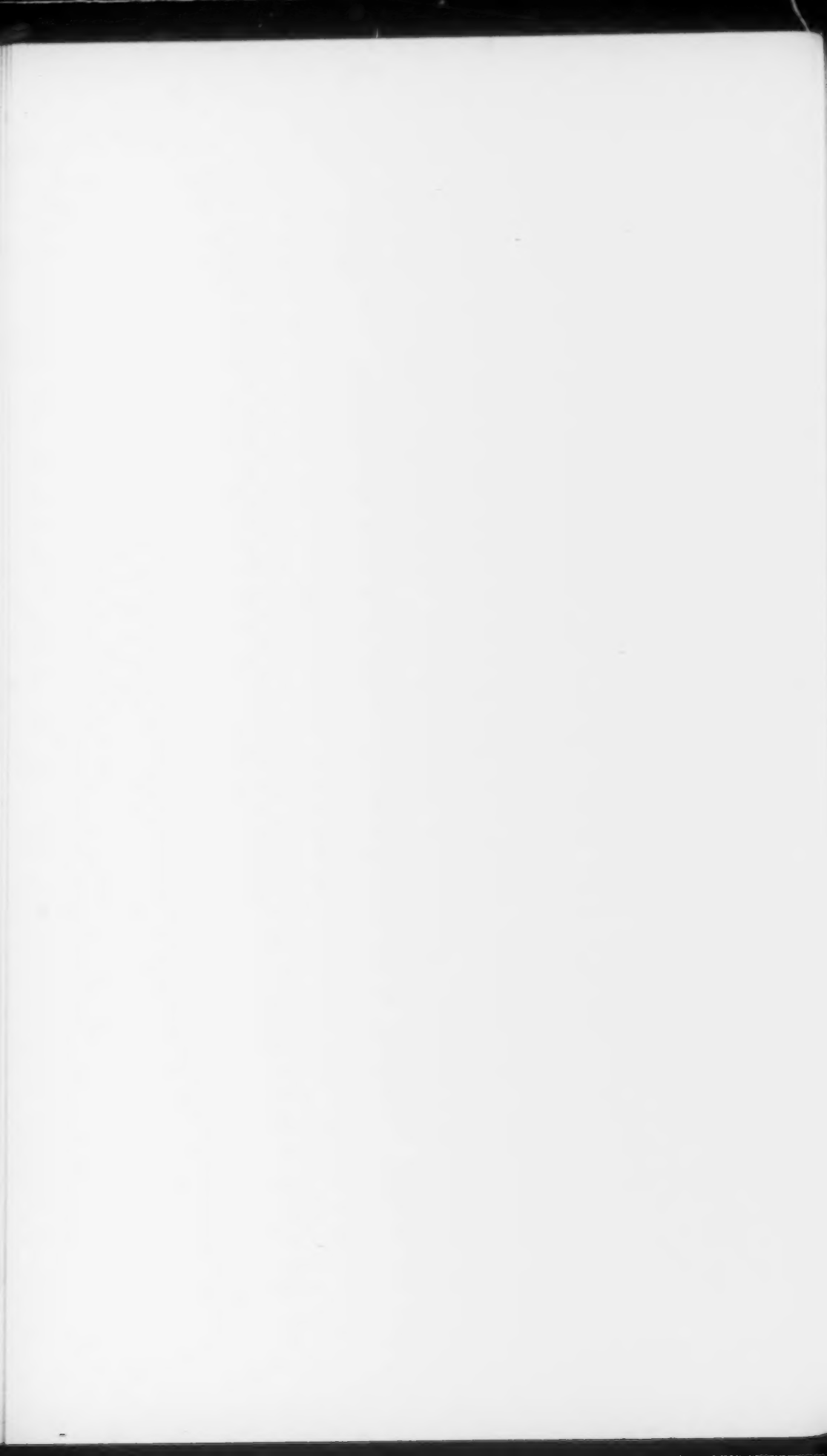
FIRST NATIONAL BANK &

TRUST COMPANY, et al.,

APPELLEES,

ORDER

On July 28, 1989 this court ordered plaintiffs to file a more complete affidavit of financial status and a statement of issues to be presented on appeal. Appellants have filed the requested supplemental information and, consequently, the court may now consider

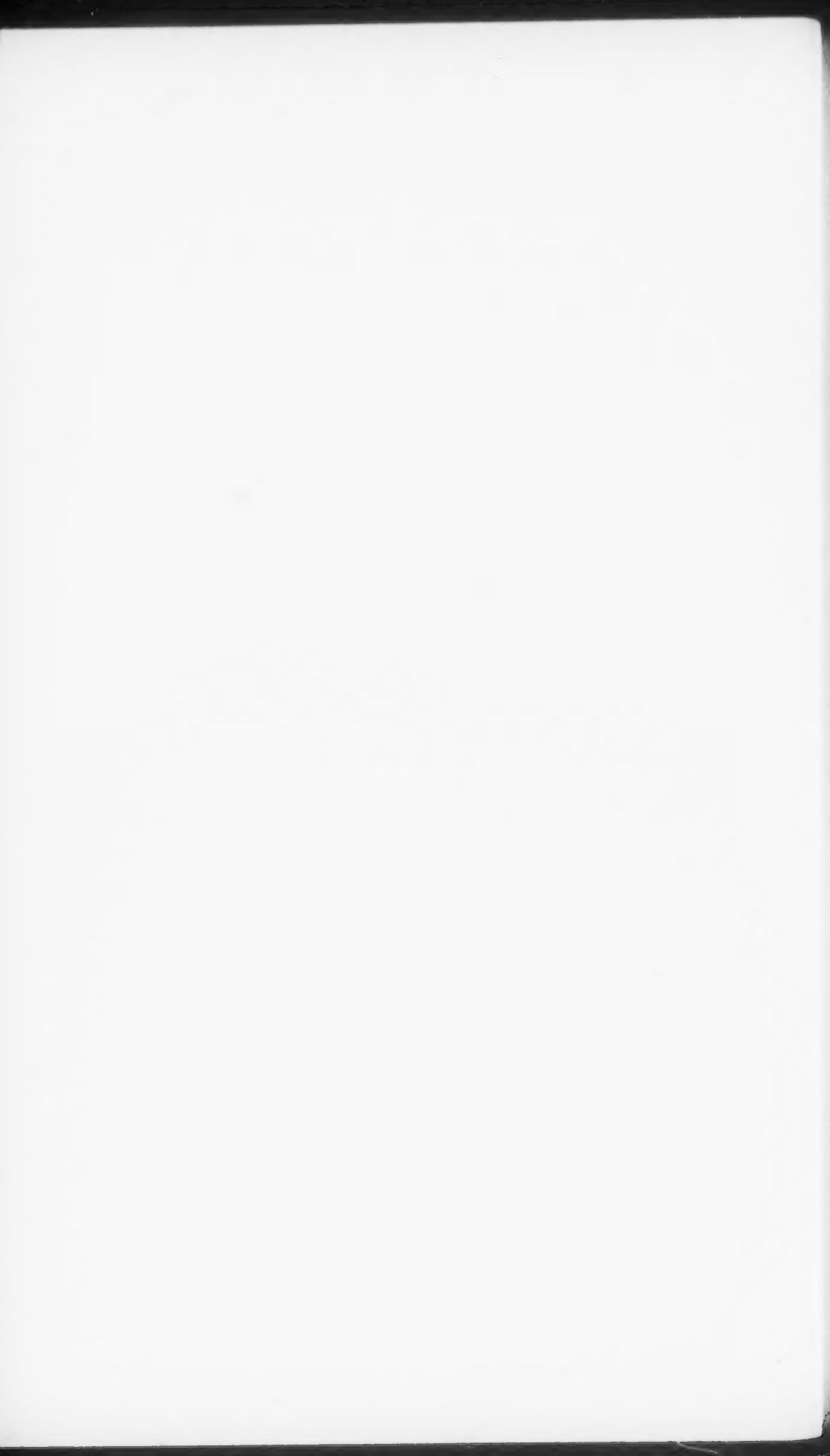


the merits of plaintiffs' motion to appeal in forma pauperis.¹

As noted in the July 28, 1989 order this court may grant a motion to proceed on appeal in forma pauperis after considering the financial affidavit presented by the moving party and the statement of issues to be determined on appeal. Appellants' statement of issues to be presented on appeal states that they wish to appeal nineteen issues involving the dismissal of their appeal. Although some of these issues are frivolous,² others are not and,

¹/Plaintiffs seek to appeal this court's order granting appellees' motion to dismiss the bankruptcy appeal for want of prosecution. See May 19, 1989 Order.

²/For example, the court does not believe that issue "(3) Whether the District Court erred when the court allowed approximately four months to pass before informing Appellants Judge Roberts had died" has merit since the particular aspects of this bankruptcy case were never before Judge Roberts.



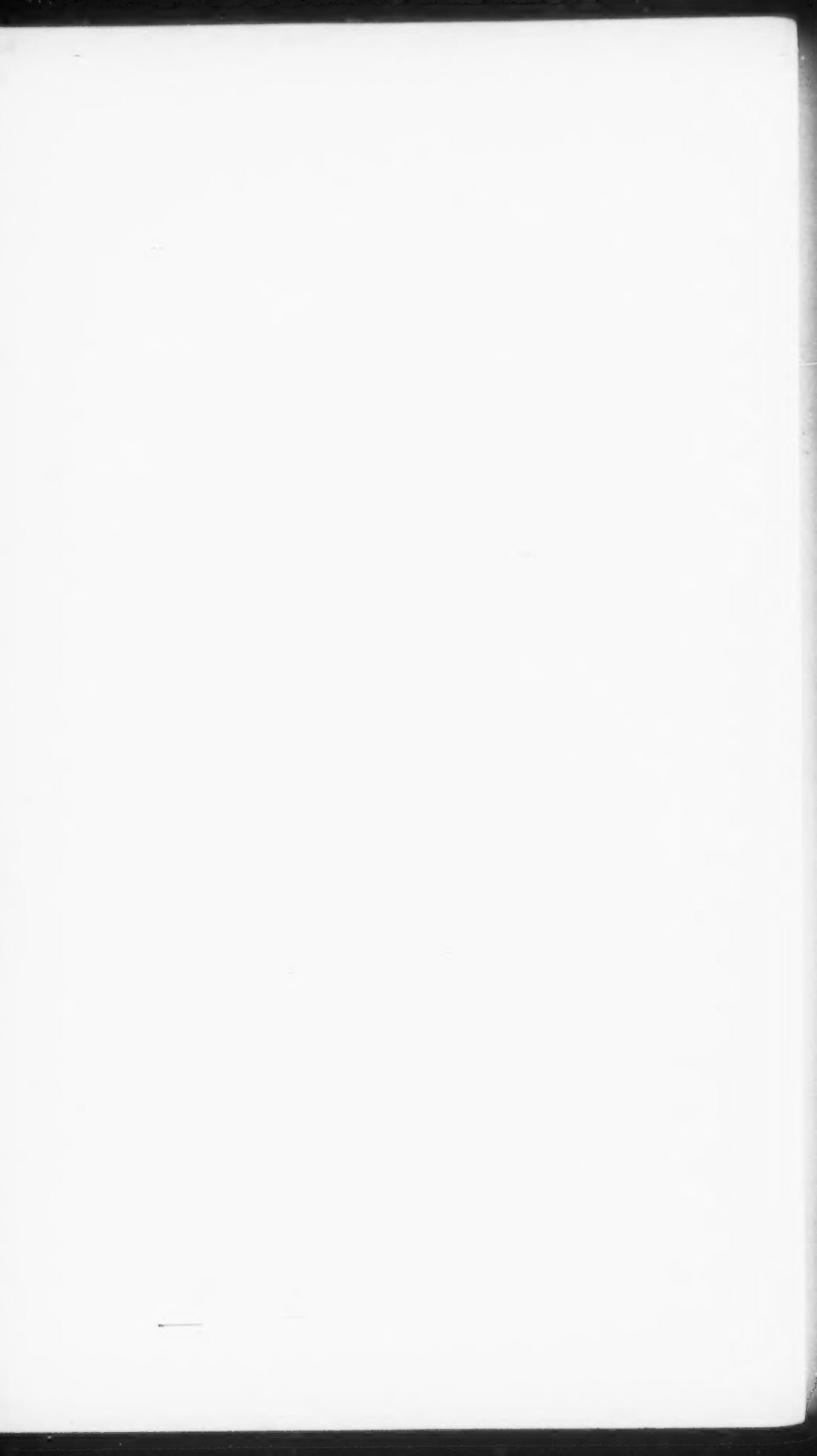
consequently, the court believes that appellants should have an opportunity to present the issues to the Eighth Circuit. Rather than list what it believes to be the issues with merit, the court will allow plaintiffs to file their appeal and the Eighth Circuit may then make specific determinations as it sees fit.

Plaintiffs' amended financial affidavit establishes that payment of the filing would be a hardship on appellants. Roger Wilhelm states that he is currently employed as president of Wilhelm Publishing, but that he receives no income from this endeavor. Mary Ellen Wilhelm works at the University of Missouri Hospital and averages a net biweekly income of \$951.96, although this amount varies depending on whether she works overtime or is asked to stay home because the hospital is overstaffed.



Appellants have four children, ranging in age from 7 to 16 years. Appellants estimate that they provide approximately 80 percent of support for the eldest child and 100 percent of support for the youngest. Plaintiffs own a house on which they owe \$118,000 in principal and additional accrued interest. They also own a 1986 station wagon. Plaintiffs have a monthly grocery expenses of \$509.47 and utility expenses of approximately \$200. Plaintiffs make monthly payments for insurance, medical expenses and credit card bills totalling \$1303.14. Roger Wilhelm borrowed \$20,000 from an aunt one year ago to restart his publishing company but has been unable to realize any income from this venture or to pay back the loan.

Although appellants' expenses appear large considering their income, the court



understands that they are trying to recover from their bankruptcy filing. Consequently, the court will allow plaintiffs to proceed in forma pauperis.³ Accordingly, it is

ORDERED that plaintiffs' motion to proceed in forma pauperis is granted. It is further

ORDERED that plaintiffs' motion for leave to file certain materials in camera is denied. The materials will not be considered by this court.

/s/
JOSEPH E. STEVENS, JR.
UNITED STATES DISTRICT JUDGE

August 23, 1989

^{3/} The court notes that plaintiffs have filed a motion to have certain materials considered in camera. Because these materials relate to the substance of plaintiff's suit, and not to the motion to proceed in forma pauperis, the court will not consider the motion, or the materials, at this time.



APPENDIX D



UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 84-01614-C-11

No. 88-1229-CV-W-8 Filed May 19, 1989

ROGER P. WILHELM, et al.,
APPELLANTS,

v.

FIRST NATIONAL BANK &
TRUST COMPANY, et al.,
APPELLEES,

ORDER

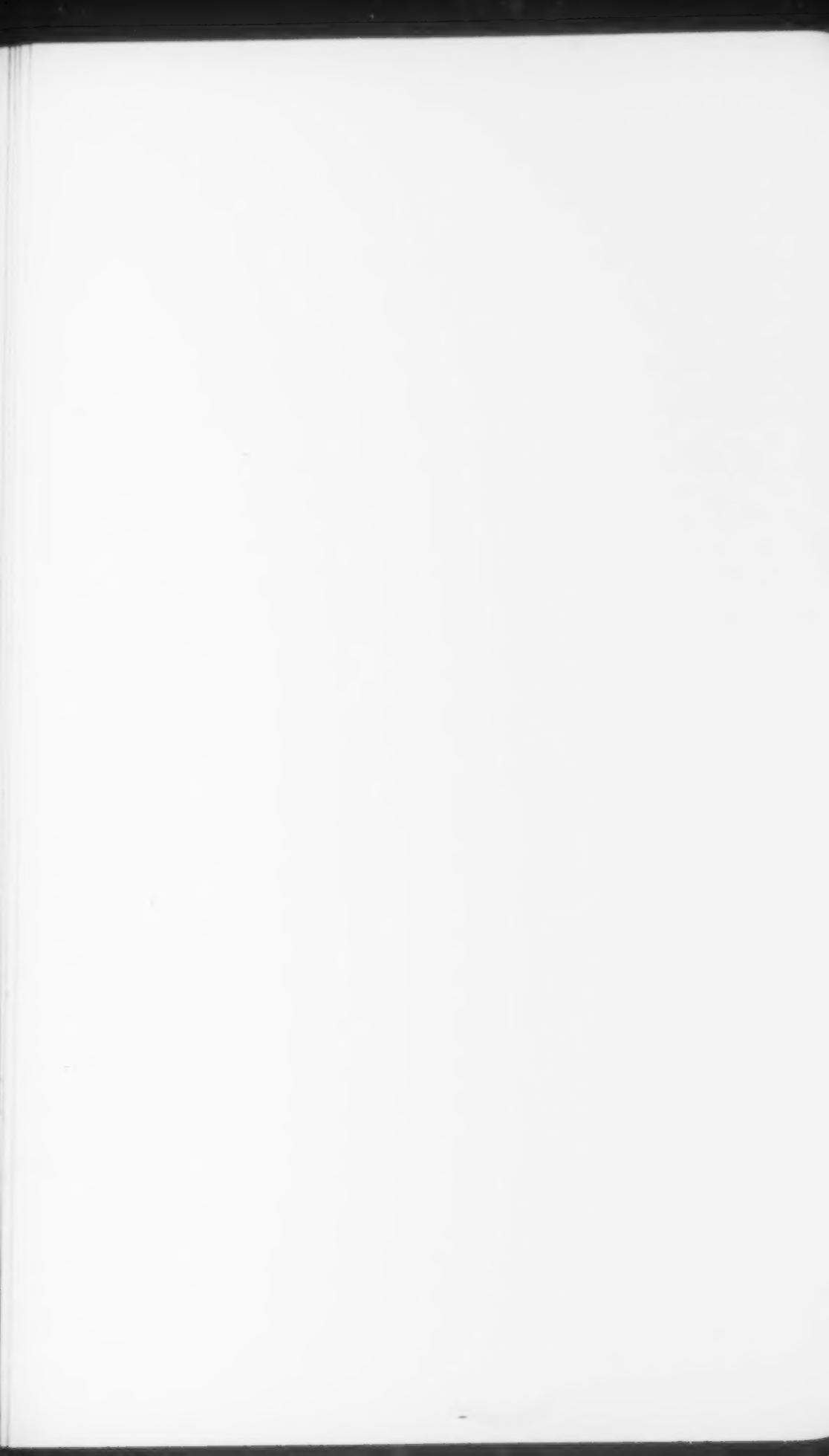
Plaintiffs initially filed this action in bankruptcy court seeking relief under Chapter 11 of the United States Bankruptcy Code. A brief examination of the record on appeal illustrates that this case has had a long history, jumping back and forth from the bankruptcy court



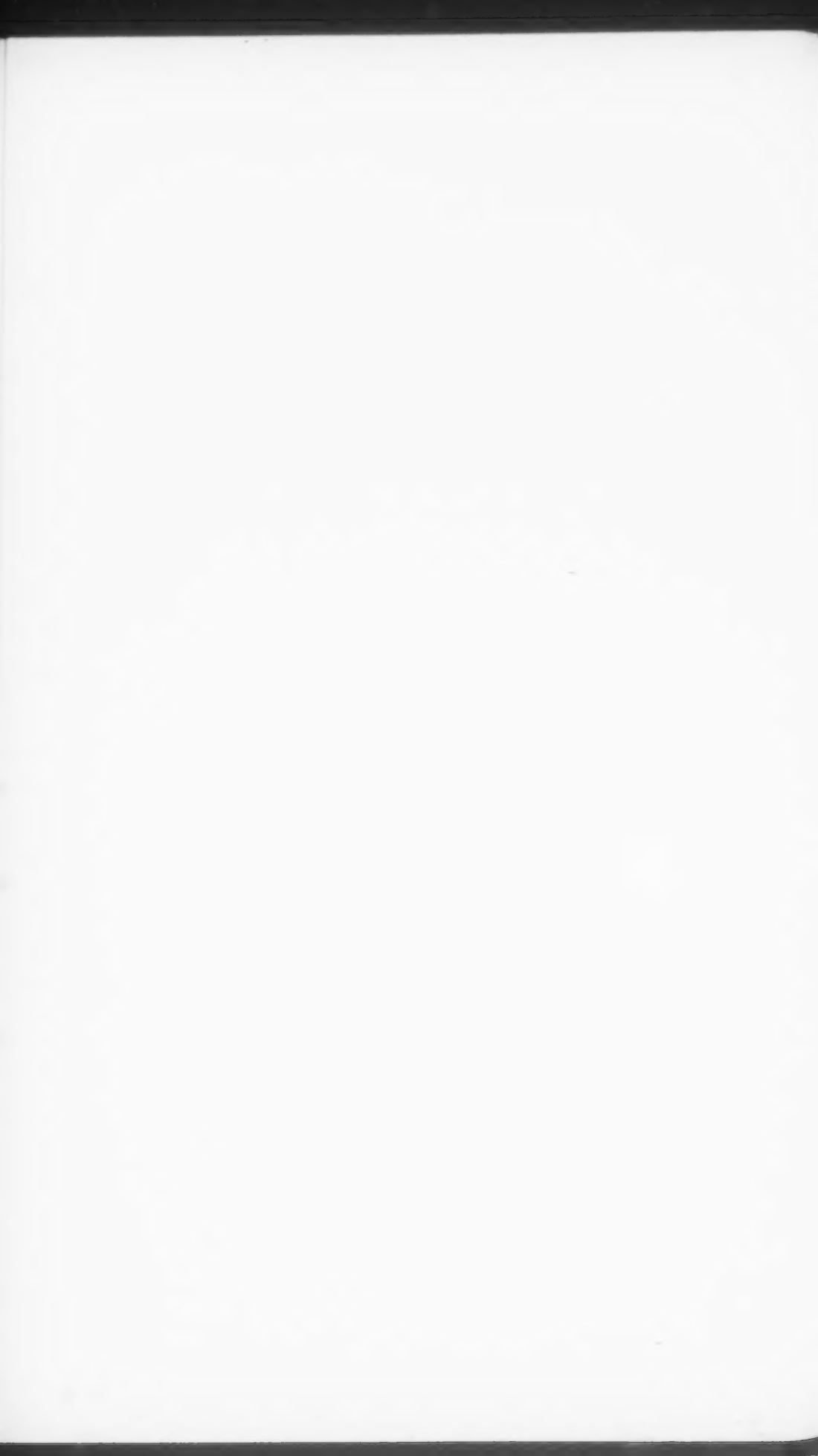
to the district court for appellate review. The case is currently before the court on appellants' motion for an extension of time in which to file their briefs, appellants' motion to transfer this appeal to the Honorable Ross T. Roberts¹ and on appellees' motion to dismiss the appeal for failure to prosecute.

A brief review of the record on appeal and the motions filed to date in this case illustrates the long history of the case and the attitude with which appellants have treated the judicial process. For example, appellant Roger Wilhelm refused to attend a November 18, 1988 hearing before Judge Karen See in

¹/Appellants seek transfer to Judge Roberts because he heard an earlier appeal involving this bankruptcy action. He later refused to reinstate the appeal because of appellants' continued use of delaying tactics. Judge Roberts died in April 1987, however, so even if this court were inclined to grant the motion, transfer would be impossible.



bankruptcy court. Mr. Wilhelm called Judge See's chambers an hour and a half after the hearing was to have started and told Judge See's secretary that he was somewhere on the road and had decided that he would not attend the hearing. Transcript of November 18, 1988 Hearing at 5-6. Similarly, on November 28, 1988 Mr. Wilhelm refused to participate in a conference call that Judge See had scheduled in order to rule on several motions that had been filed. See Transcript of November 28, 1988 Teleconference at 2-3. In addition, appellants have twice filed motions for an extension of time in which to file their designation of contents for inclusion in the record on appeal. One of these extensions was granted while the other was denied. Defendants ultimately filed their statement of issues to be



presented on appeal on November 21, 1988. The appeal was entered on this court's docket on December 13, 1988.

Bankruptcy Rule 8009 provides that "[t]he appellant shall serve and file his brief within fifteen days after entry of the appeal on the docket pursuant to rule 8007." Thus, appellants' brief in the instant case was due on December 28, 1988. On December 29, 1988 appellants filed their motion for an extension of time in which to file their briefs, arguing that they needed an indefinite extension of time to file their briefs because they intended to prepare a writ of prohibition to have Judge See prevented from participating in any further proceedings considering this case. Appellants argue that the writ would "partially or completely decide a number of issues raised in the appeal."

Motion at 1. To date the file reflects no evidence that appellants have proceeded with the preparation of this writ. Appellees argue that the motion for an extension of time should be denied and that the case should be dismissed for failure to comply with the time limit provided in rule 8009 because this motion is just another link in appellants' never ending chain of motions to prolong this bankruptcy proceeding.

The purpose of rule 8009 is to insure that bankruptcy matters are disposed of in a timely manner. First National Bank of Maryland v. Markoff, 70 B.R. 264, 265 (S.D.N.Y. 1987). Because the timeliness of bankruptcy proceedings is of primary importance, courts considering whether to dismiss appeals under rule 8009 must consider "the prejudicial effect of delay on the



appellees and the bona fides of the appellants." In re Braniff Airways, Inc., 774 F. 2d 1303, 1304 (5th Cir. 1985) (quoting Pyramid Mobile Homes, Inc. v. Speake, 531 F. 2d 743, 746 (5th Cir. 1976)).

While rule 8009 allows for dismissal of claims if appellate briefs are not timely filed, the rule is discretionary, not jurisdictional. See, e.g., In re Tampa Chain Co., 835 F. 2d 54, 55 (2d Cir. 1987); First National Bank of Maryland, 70 B.R. at 265. The majority of courts considering the issue have held that dismissal is appropriate in situations where the appellant exhibits bad faith, negligence or indifference. See, e.g., In re Beverly Manufacturing Corp., 778 F.2d 666, 667 (11th Cir. 1985); Lawless v. Central Production Credit Association, 81 B.R. 475, 477



(S.D. Ill. 1987). Courts also consider whether appellants have consistently exercised dilatory behavior. See, e.g., Beverly Manufacturing Co., 778 F.2d at 667 ("dismissal typically occurs in cases showing consistently dilatory conduct . ."); First National Bank of Maryland, 70 B.R. at 265 ("courts only utilize the sanction of dismissal where a party has exhibited a consistent pattern of dilatoriness throughout a proceeding").

Courts faced with facts similar to those presented in the instant case have held that dismissal is appropriate under rule 8009. In Lawless the appellants failed to attend two bankruptcy court status conferences and failed to respond to a bankruptcy court order assessing fees against appellants' attorney. 81 B.R. at 476. After filing an initial notice of appeal, appellants filed for



and received an extension of time to file their appellate briefs. A second motion for an extension of time was filed, but was denied by the district court. Id.

The district court ultimately dismissed the appeal pursuant to rule 8009, finding that the procedural history of the case

clearly manifests gross negligence, if not blatant indifference, to both the bankruptcy court and this court's orders. The court additionally notes that procrastination, delay, outright disregard of court orders, and generally dilatory conduct are the norm, not the exception, in counsel's practice before this court.

Id. at 477. See also In re Quevedo, 35 B.R. 117, 120 (D.P.R. 1983) (dismissal appropriate when appellant failed to request an extension of time and failed to submit brief in a timely manner).

Similarly, in In re Har-Dway House Statutory, Inc., 76 F.R.D. 204, 250 (E.D. Mo. 1977), the court dismissed an appeal



where the appellant did not file a brief, request an extension of time or respond to a motion to dismiss. See also In re Benhil Shirt Shops, Inc., 82 B.R. 7, 9 (S.D.N.Y. 1987) (court dismissed bankruptcy appeal when appellant untimely served its issues statements and failed to file a request for an extension of time, an appellate brief and a response to a motion to dismiss).

Appellants in the instant case have consistently exhibited a dilatory attitude to these proceedings. They have refused to attend two bankruptcy court proceedings and have attempted to delay their appeal by requesting two extensions of time in which to file their record on appeal. After the second motion was denied appellants filed an untimely motion for an extension of time in which to file their appellate brief. This

motion did not request a specific period for the extension but rather sought an indefinite extension until appellants had had a chance to file a writ of prohibition against Judge See. Even if the record reflected that appellants had taken steps toward seeking the writ, the court would deny the motion for an extension of time, and grant appellees' motion to dismiss, since appellees have been prejudiced by the delay tactics used by appellants in this lawsuit.

Accordingly it is

ORDERED that appellants' motion for an extension of time in which to file their appellate brief is denied. It is further

ORDERED that appellees' motion to dismiss the appeal is granted. It is further



-20a-

ORDERED that appellants' motion to
transfer the case is denied as moot.

/s/
JOSEPH E. STEVENS, JR.
UNITED STATES DISTRICT JUDGE

May 19, 1989

APPENDIX E

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 84-01614-C-11

No. 87-4149-CV-C-5

Ad. No. 87-0183-C-1-KMS

Filed September 29, 1988

ROGER P. WILHELM, et al.,

APPELLANTS,

v.

FIRST NATIONAL BANK &

TRUST COMPANY, et al.,

APPELLEES,

ORDER DENYING PLAINTIFFS' MOTION FOR NEW
TRIAL ON DEFENDANT'S COUNTERCLAIM AND
DENYING PLAINTIFFS' MOTION FOR THE COURT
TO RESCIND THE SUMMARY JUDGMENT ON
PLAINTIFFS' PETITION, DATED OCTOBER 28,
1987, AND ORDER A TRIAL ON PLAINTIFFS'
PETITION.

After review of the file and plaintiffs' motion filed on September 13, 1988, the Court finds the motions are without merit. The Court further notes the content is essentially identical to Plaintiffs' Objections to Defendant's Counsels Preparing Findings of Fact, Conclusions of Law and Order on Defendants' Counterclaim, filed September 2, 1988. No further redundant post-trial motions will be entertained. If such additional post-trial motions are filed they will be deemed stricken at the time of filing. Accordingly, for lack of cause shown, it is hereby

ORDERED that plaintiffs' Motion for New Trial on Defendant's Counterclaim, and plaintiff's Motion that the Court Rescind the Summary Judgment on Plaintiff's Petition, Dated October 28, 1987, and Order a Trial of Plaintiffs'



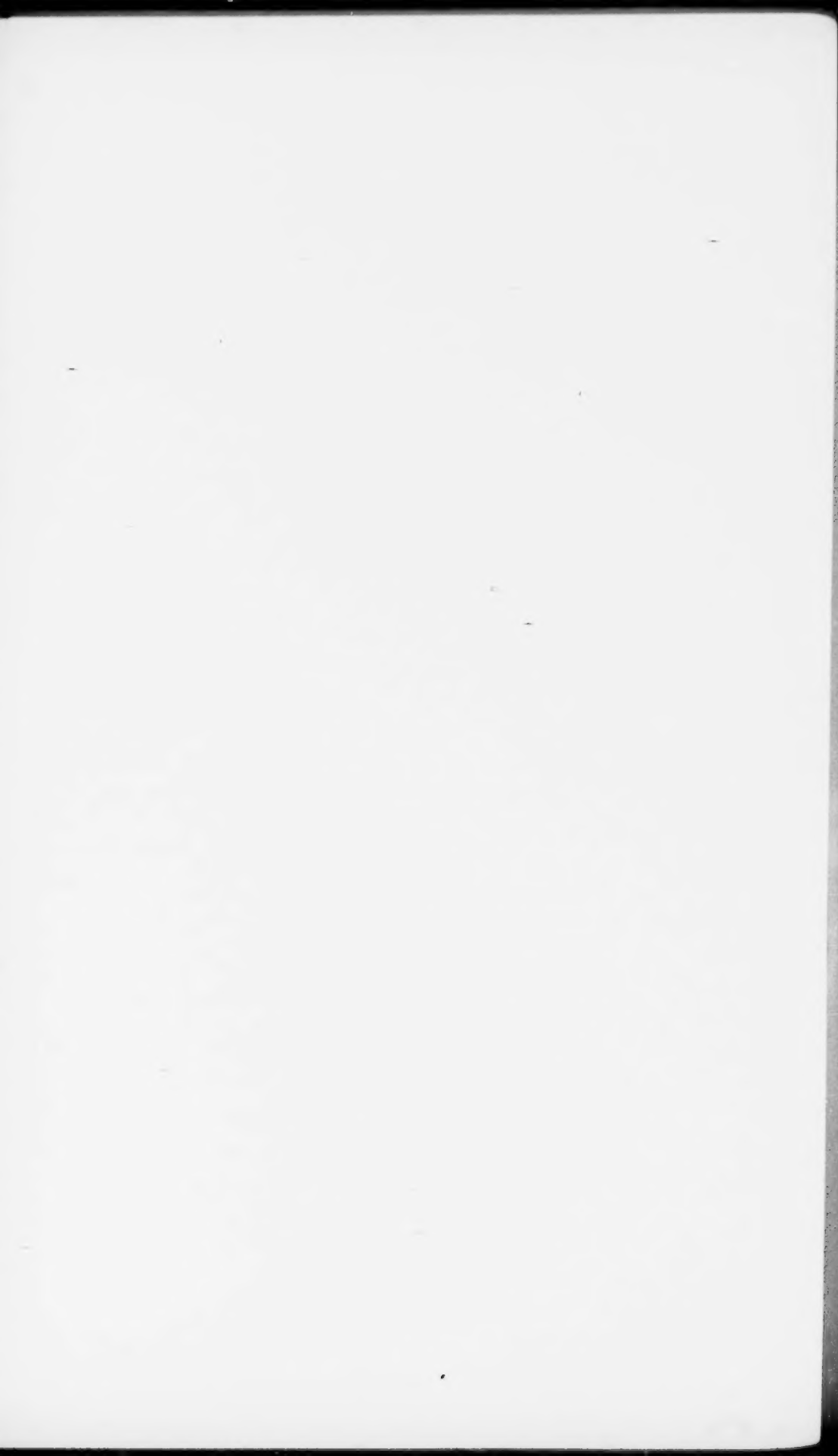
-23a-

Petition, are denied. It is

FURTHER ORDERED that no further post-trial motions from plaintiffs will be entertained. Any such motions will be deemed stricken as of the time they are filed.

/s/
KAREN M. SEE
UNITED STATES BANKRUPTCY JUDGE

September 29, 1988



APPENDIX F



UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 84-01614-C-11

No. 87-4149-CV-C-5

Ad. No. 87-0183-C-1-KMS

Filed August 31, 1988

ROGER P. WILHELM, et al.,

APPELLANTS,

v.

FIRST NATIONAL BANK &

TRUST COMPANY, et al.,

APPELLEES,

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER ON DEFENDANTS' COUNTERCLAIM

The trial of defendants' counterclaim

was held on August 19, 1988. Plaintiffs

Roger Perry Wilhelm and Mary Ellen

Wilhelm failed to appear at 10 a.m., the

time scheduled for the commencement of trial. The Court, on its own motion, called plaintiff Mary Ellen Wilhelm at her home in Columbia, Missouri, and was informed by her that plaintiff Roger Wilhelm had not left Columbia, Missouri, for the trial in Kansas City, Missouri until 9 a.m. on the morning of the trial. The Court thereupon delayed taking up this matter until approximately 11:30 a.m. in order to give plaintiff Roger Wilhelm sufficient time to travel from Columbia, Missouri to Kansas City, Missouri. At approximately 11:30 a.m., plaintiff Roger Wilhelm called the Court and indicated that he elected not to be present for the trial of the matter. Upon hearing from plaintiff Roger Wilhelm, the Court then proceeded to take up the trial of this matter without plaintiffs' appearance. Defendants



appeared by attorney Bruce H. Beckett and by Larry R. Niedergerke, both as an individual defendant and as a corporate officer of defendant First National Bank and Trust Company. The defendants introduced evidence and rested defendants' case.

Findings of Fact

After having considered the evidence, the Court hereby makes the following findings of fact:

1. Plaintiffs Roger Perry Wilhelm and Mary Ellen Wilhelm filed suit against defendants in the Circuit Court of Boone County, Missouri, alleging violations of an order entered by this Court in Adversary Case No. 85-0687-C-11 relating to Bankruptcy Case No. 84-01614-C, which petition was in three counts, and sought remedies for defendants' alleged violations of this Court's Order of



October 8, 1986, in the form of an injunction enjoining defendants from foreclosing the liens of certain deeds of trust, seeking damages from defendants in the amount of \$5,458,000 in the aggregate, and seeking other relief, said petition having been filed by plaintiffs against defendants on March 6, 1987.

2. That plaintiffs petition contained numerous allegations which were clearly false and which plaintiffs knew were false at the time the petition was filed, including an allegation that plaintiffs were not in default under the several loans referred to therein.

3. That defendants had, in good faith, complied with this Court's order of October 8, 1986.

4. That subsequent to the filing of said petition in the Circuit Court of Boone County, Missouri, this matter was

removed to the United States District Court for the Western District of Missouri and reassigned to this Bankruptcy Court.

5. That on October 28, 1987, this Court entered its Findings of Fact, Conclusions of Law, and Order sustaining defendants' motion for summary judgment on all counts of plaintiffs petition.

6. That the petition filed by plaintiffs on March 6, 1987, was spurious and filed by plaintiffs in bad faith with malicious intent and for the improper and illegal purpose of harassing defendants and delaying and hindering defendants' efforts to exercise their rights under this Court's Order of October 8, 1986, entered in Adversary Case No. 85-0687-C-11.

7. That the malicious purpose and intent of plaintiffs in filing said

petition is clearly established by the record in this adversary case and in Adversary Case No. 85-0687-C-11, Bankruptcy Case No. 84-01614-C, appeal No. 87-0050-CV-W-0 and in the record of all other proceedings relating to this bankruptcy case in that the record in said cases demonstrates a continuing and ongoing course of conduct by plaintiffs' in attempting to delay defendants First National Bank and Trust Company and Larry R. Niedergerke, Trustee, from collecting the debts and obligations of plaintiffs to defendant First National Bank and Trust Company and from foreclosing its liens upon the property pledged to secure said obligations; and that said malicious purpose and intent of plaintiffs is further evidenced by plaintiffs' failure to propose an appropriate plan of reorganization in a timely fashion, by



changing attorneys of record in this proceeding and in related proceedings on at least five different occasions, by filing numerous and spurious motions, including motions to disqualify the judge, motions to disqualify the attorneys for defendants, by filing appeals in an untimely fashion, by engaging in abusive discovery practices, by serving unwarranted subpoenas, and by making numerous, unreasonable demands on this Court and on defendants and their attorneys.

8. That defendants have incurred \$8,029.26 in attorney's fees in defending the petition filed by plaintiffs in the Circuit Court of Boone County, Missouri, which was ultimately disposed of by this Court's order of October 28, 1978, and that said amount is exclusive of any attorney's fees incurred by defendants



relating to plaintiffs' bankruptcy case or any of the appeals or other adversary proceedings and exclusive of any costs and expense incurred by defendants in connection with the foreclosures conducted by defendants on March 10, 1987, and further exclusive of any attorney's fees incurred by defendants after this Court sustained defendants' motion for summary judgment on plaintiffs' petition on October 28, 1987; and that said \$8,029.26 in attorney's fees constitutes a reasonable attorney's fee for defense of plaintiff's petition.

Conclusions of Law

Based on the foregoing Findings of Fact, and the record in this case and in the cases referred to herein, the Court makes the following conclusions of law:

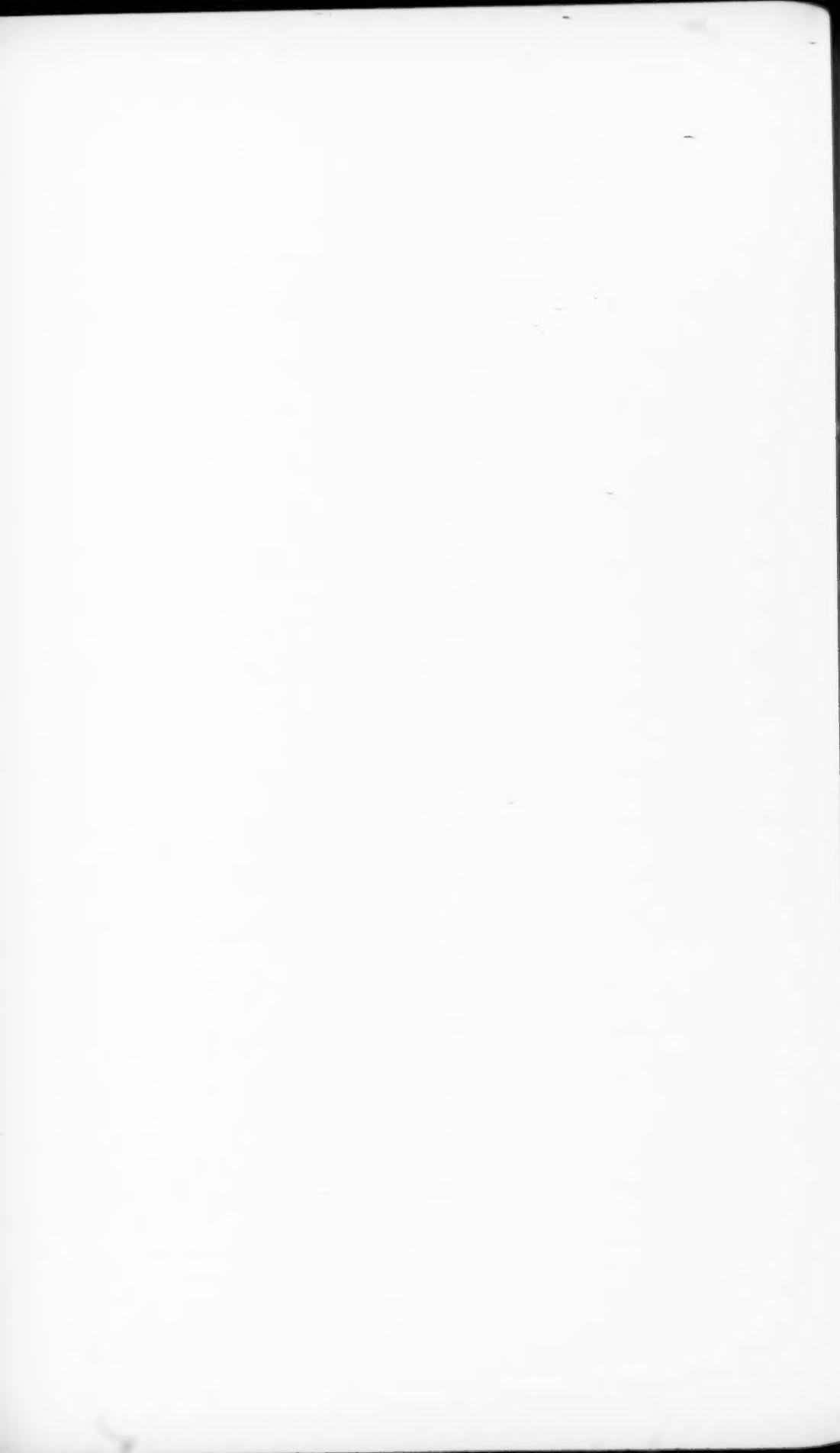
1. Under the facts of this case, plaintiffs' filing of the three count



petition in the Circuit Court of Boone County, Missouri, against defendants was a willful, malicious, and intentional abuse of process of law filed by plaintiffs for the improper and unlawful motive of harrassing defendants and further hindering and delaying the efforts of defendants to collect the just debts and obligations of plaintiffs to defendant First National Bank and Trust Company and in exercising its legitimate rights under this Court's order of October 8, 1986.

2. That as a direct and proximate result of plaintiffs' improper and unlawful abuse of process, defendants sustained damage in the amount of \$8,029.26.

3. That plaintiffs made a conscious decision not to attend the trial of this matter or to defend defendants'



counterclaim against plaintiffs.

4. That because of the totality of the circumstances and the malicious and improper motives and purposes of plaintiffs and in order to discourage plaintiffs and others similarly so situated from engaging in the abuse of process for improper and unlawful purposes, an award of punitive damages is appropriate in this matter.

Order

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that defendants have judgment against plaintiffs, jointly and severally, in the amount of \$8,029.26 in actual damages and \$8,100 in punitive damages. Costs of this action are hereby taxed against plaintiffs.

_____/s/
KAREN M. SEE
UNITED STATES BANKRUPTCY JUDGE

August 31, 1988



APPENDIX G

APPENDIX I



UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 84-01614-C-11

No. 87-4149-CV-C-5

Ad. No. 87-0183-C-1-KMS

Filed October 28, 1987

ROGER P. WILHELM, et al.,

APPELLANTS,

v.

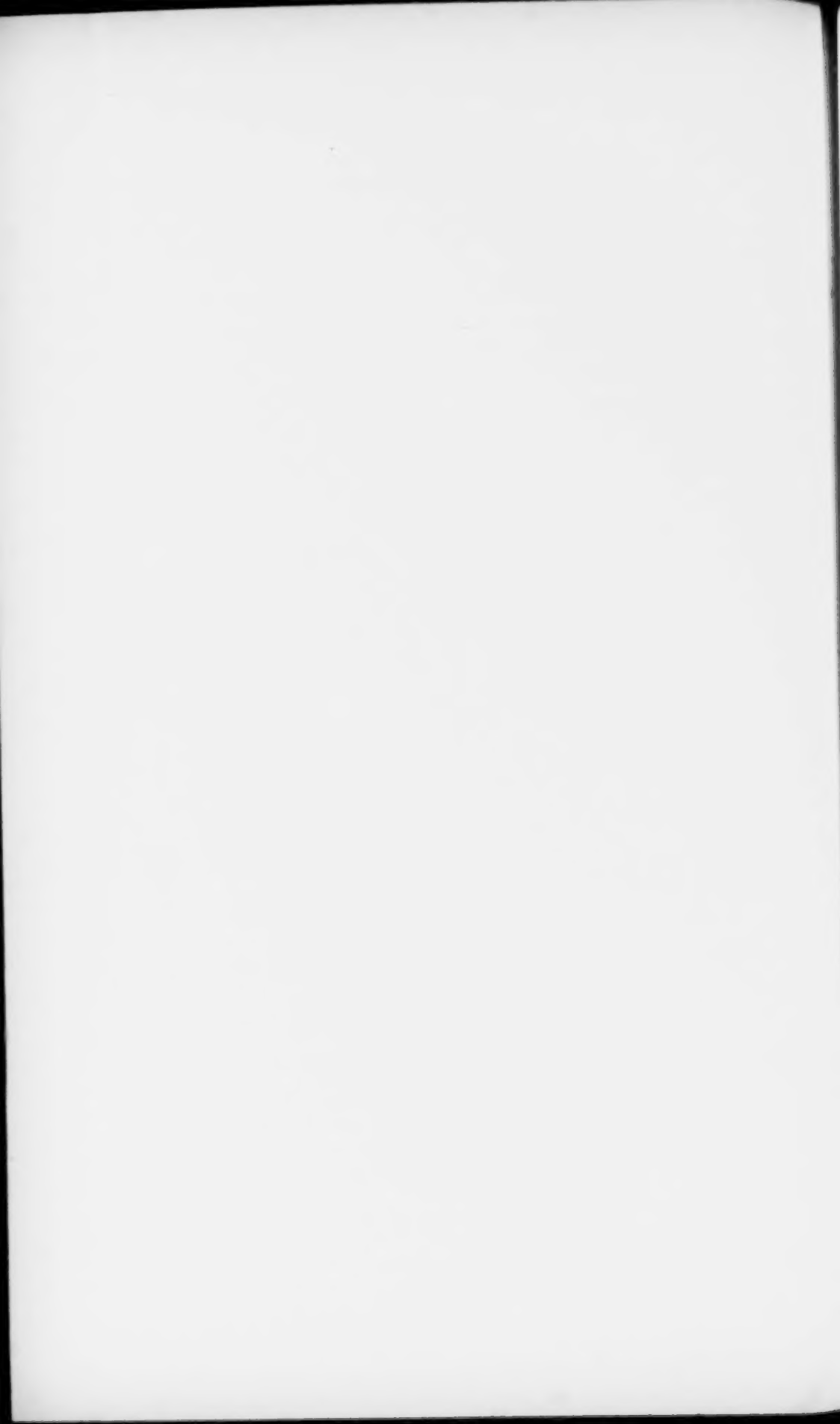
FIRST NATIONAL BANK &

TRUST COMPANY, et al.,

APPELLEES,

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER ON DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT ON PLAINTIFF'S PETITION

Now on this ____ day of _____,
1987, the Court takes up and considers
the motion for summary judgment filed



herein by defendants First National Bank and Trust Company and Larry R. Niedergerke, Trustee, seeking summary judgment on all counts of plaintiffs' petition. The Court, having heard argument thereon, on August 18, 1987, at which hearing plaintiffs' attorney, H. Kent Desselle, and defendants' attorneys, Bruce H. Beckett and Victor Tell Neff, were present, and after having considered suggestions of the parties filed in support and in opposition, the affidavit of Larry R. Niedergerke, and after having taken judicial notice of all pleadings, motions, orders, and judgments filed in this Adversary Case No. 87-0183-C-1-KMS and in Bankruptcy Case No. 84-01614-C and in Appeal No. 87-0050-CV-W-o, and in Adversary Case No. 85-0687-C-11 tried before this Court on July 28 and 29 and August 4, 1986, the Court finds that



defendants are entitled to judgment in their favor and against plaintiffs on all counts of plaintiffs' petition.

Findings of Fact

The Court, having considered all of the foregoing matters in connection with defendants' motion for summary judgment, finds the following facts:

1. This Court entered its order in Adversary Case No. 85-0687-C-11 on October 8, 1986, disposing of all matters then in dispute between plaintiffs and defendants, directing defendant bank to release the lien of its deed of trust on plaintiffs' residence, granting defendant bank a replacement lien on plaintiffs' 35.32 acre tract of land, and granting defendant bank relief from the automatic stay to the extent necessary to foreclose the lien of its various deeds of trust and the replacement lien, hereinafter



called the "Order of October 8, 1986."

2. Subsequent to the entry of this Court's Order of October 8, 1986, plaintiffs filed their notice of appeal on October 20, 1986, but took no action to perfect the appeal, and on December 2, 1986, this Court dismissed the appeal.

3. On December 15, 1986, plaintiffs filed a motion requesting this Court to set aside the dismissal and reinstate plaintiffs' appeal, which motion was denied by this Court's order of December 30, 1986.

4. Thereafter, and on January 7, 1987, plaintiffs filed a notice of appeal in the United States District Court appealing from this Court's order of December 30, 1986, which was disposed of by an order entered by the Honorable Ross T. Roberts, District Judge of the United States District Court, in Appeal No. 87-



0050-CV-W-O, entered on February 23, 1987.

5. Plaintiffs did not appeal from the order of the United States District Court of February 23, 1987, affirming this Court's order of December 30, 1986.

6. All of the forgoing is established by and contained in the records of this Court in Bankruptcy Case No. 84-01614, in Adversary Case No. 85-0687-C-11, and in Appeal No. 87-0050-CV-W-O.

7. This Court's Order of October 8, 1986, authorized defendant bank to commence foreclosure proceedings on the 35.32 acre tract and on the 7.41 acre tract.

8. Defendant bank did, in fact, commence foreclosure of the 35.32 acre tract by giving notice calling for the sale of said tract on March 10, 1987; and



said sale was in fact, made on March 10, 1987.

9. Defendant bank also commenced foreclosure proceedings on the 7.41 acre tract by giving notice calling for the sale of said tract on March 10, 1987; and said sale was, in fact, made on March 10, 1987.

10. Immediately after the District Court's order of February 23, 1987, in Appeal No. 87-0050-CV-W-O affirming this Court's order of December 30, 1986 in Adversary Case No. 85-0687-C-11, and prior to the above-referred-to foreclosure sales, defendant bank released the deed of trust on plaintiffs' residence and returned the note secured thereby to plaintiffs as required by this Court's order of October 8, 1986.

11. Count I of plaintiffs' petition seeks to set aside the foreclosure



proceedings conducted on March 10, 1987, to recover a penalty under Section 443.170 RSMo (1986) in the amount of \$8,000, and to recover \$450,000 in damages for alleged loss in equity in the properties which were foreclosed by defendant bank, and for attorney's fees.

12. Count I of plaintiffs' petition alleges as grounds for the relief requested that plaintiffs were not in default under the terms of the deeds of trust which defendant bank foreclosed; that defendants failed to comply with the provisions of Section 443.060 and Section 443.170 (1986) in that defendants failed to release the lien of the deed of trust on debtors' residence as required by this Court's Order of October 8, 1986; and that defendants failed to act in good faith by failing to release the deed of trust on debtors' residence.



13. At the time said foreclosure proceedings were instituted, and at the time the foreclosure sales were conducted, on March 10, 1987, plaintiffs were in default on all of their obligations to defendant bank, including the notes and indebtedness secured by defendant bank's various liens on defendants' properties.

14. On March 10, 1987, there were \$540,911.59 in liens and encumbrances against plaintiffs' 35.32 acre tract consisting of \$18,132.92 in delinquent real estate taxes, a first deed of trust in favor of defendant bank securing indebtedness in the amount of \$237,842.34, a second deed of trust in favor of defendant bank securing indebtedness in the amount of \$164,184.09, and the replacement lien in favor of defendant bank securing indebtedness in the amount of



\$120,752.24, the amount of said indebtedness having been established under this Court's Order of October 8, 1986, except for the delinquent real estate taxes which were established by the affidavit of Larry R. Niedergerke.

15. Defendant bank foreclosed the lien of the second deed of trust on said 35.32 acre tract, and said sale was conducted subject to the prior liens for delinquent real estate taxes in the amount of \$18,132.92 and the first mortgage indebtedness in the amount of \$237,842.34; and that at said sale defendant bank's subsidiary, First National Liquidating and Foreclosing Corporation, was the successful bidder, having bid \$272,934, for a total purchase price, including the lien for delinquent real estate taxes and the indebtedness secured by the first deed of trust, in

the amount of \$528,909.26, which amount was within the range of values established for said 35.32 acre tract of land by this Court's Order of October 8, 1986; and that said sale resulted in a deficiency on the replacement lien, as of March 10, 1987, in the amount of \$12,893.63 after payment of the costs and expenses of sale.

16. On March 10, 1987, there were \$36,299.20 in liens and encumbrances against plaintiffs' 7.41 acre tract of land, not including any lien for delinquent real estate taxes, said amount consisting of the balance due under the promissory note secured by the first deed of trust against said 7.41 acre tract of land in favor of defendant bank, which amount was established by this Court's Order of October 8, 1986.

17. Defendant bank released the



deed of trust on defendants' residence prior to the foreclosure sales referred to above and in accordance with this Court's Order of October 8, 1986, and within 30 days of demand for said relief made by plaintiffs' attorney under letter of February 23, 1987; and that specifically, said deed of release and debtors' \$80,000 promissory note were sent to plaintiffs' attorney on March 5, 1987.

18. At the foreclosure sale of said 7.41 acre tract of land conducted on March 10, 1987, Wulff Brothers Construction Company was the successful bidder, having bid \$25,500, said amount being within the range of values established for said 7.41 acre tract of land as found and determined by this Court's Order of October 8, 1986, resulting in a deficiency due defendant

bank in the amount of \$11,611.30 after payment of the costs and expenses of sale.

19. Count II of plaintiffs' petition is sounded in tort and alleges that defendant bank intentionally refused to release the note and deed of trust on plaintiffs' residence knowing it would prevent plaintiffs from obtaining financing, which would prevent a foreclosure of the 35.32 acre tract of land and the 7.41 acre tract of land, and that as a result thereof, plaintiffs lost \$450,000 in equity in said property, and that because of said alleged conduct on the part of defendant bank, plaintiffs are entitled to \$450,000 in actual damages and punitive damages.

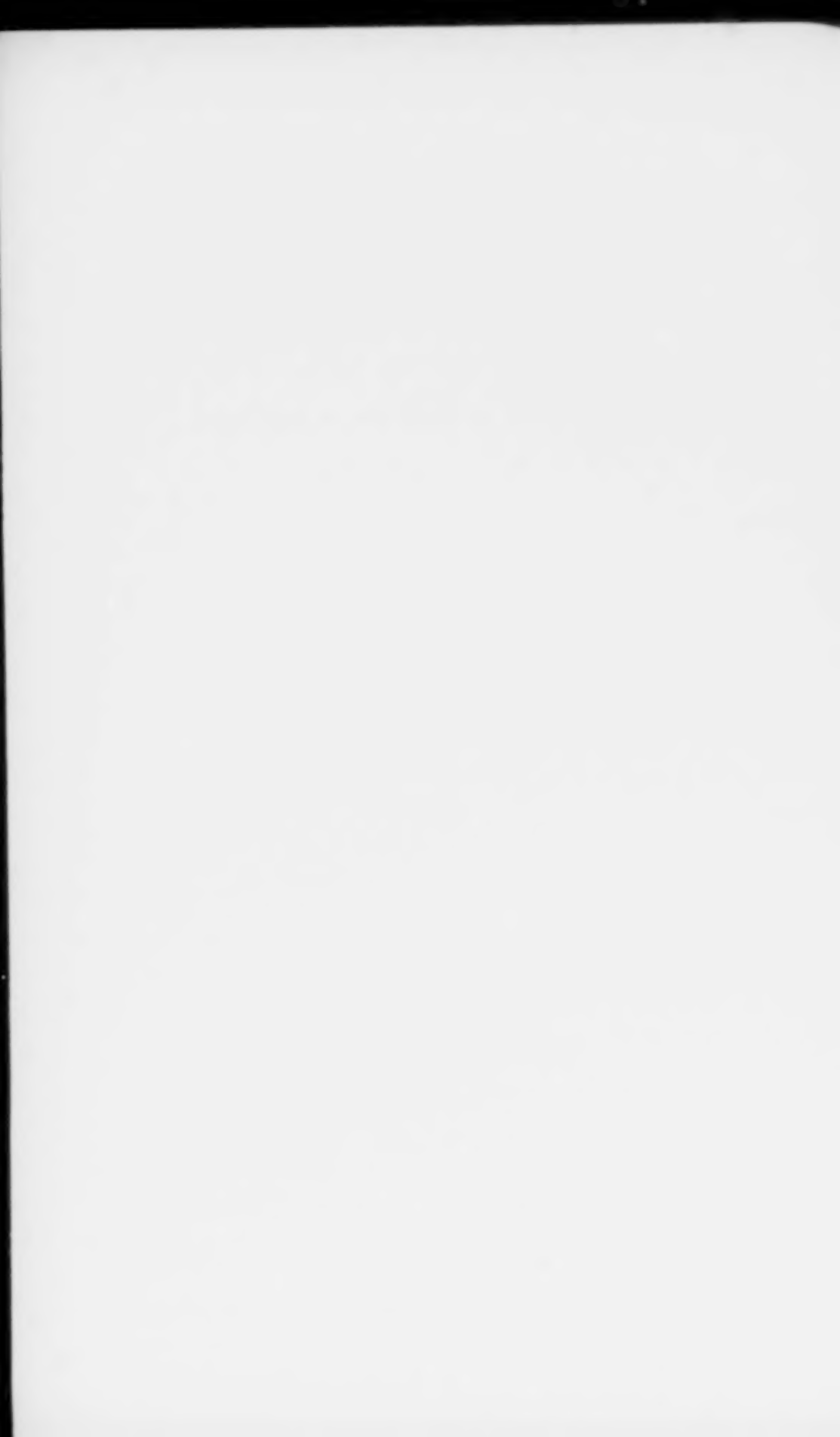
20. Defendant ~~bank~~ acted in good faith in releasing the deed of trust on plaintiffs' residence and in waiting



until after the order of the United States District Court of February 23, 1987, before releasing the lien of said deed of trust, and defendant bank has acted in good faith in all respects in complying with the requirements of this Court's Order of October 8, 1986, and in fact complied with all requirements of this Court's Order of October 8, 1986.

21. Count III of plaintiffs' petition seeks to quiet title to plaintiffs' residence in plaintiffs, an order cancelling the notes and deeds of trust in plaintiffs' favor relating to all of plaintiffs' property and seeking attorney's fees.

22. At the time plaintiffs' petition in this action was originally filed in the Circuit Court of Boone County, Missouri, March 6, 1987, defendants had already, on March 5, 1987,



mailed the full release of the deed of trust in favor of defendant bank on plaintiffs' residence, and the original \$80,000 note secured thereby, to plaintiffs' attorney H. Kent Desselle, and defendants had notified plaintiffs by letter dated March 3, 1987, from Victor Tell Neff to plaintiffs' attorney H. Kent Desselle, that said release and the promissory note would be forthcoming, and that therefore, on the date plaintiffs' petition was filed, defendants had and claimed to have no interest in plaintiffs' residence.

23. Plaintiffs have filed no counter-affidavit in opposition to defendants' motion for summary judgment.

Conclusions of Law

The Court hereby makes the following conclusions of law in connection with defendants' motion for summary judgment



on all counts of plaintiffs' petition:

1. The existence and validity of the first deed of trust on plaintiffs' 35.32 acre tract in favor of defendant bank and the amount of the debt secured thereby (\$237,842.34 as of March 10, 1987), the existence and validity of the second deed of trust on plaintiffs' 35.32 acre tract of land in favor of defendant bank and the amount of the debt secured thereby (\$164,184.09 as of March 10, 1987), and the establishment and validity of the replacement lien on plaintiffs' 35.32 acre tract in favor of bank securing indebtedness in the amount of \$120,752.24 as of March 10, 1987, has previously been litigated and determined by this Court in its Order of October 8, 1986, and plaintiffs are barred from relitigating the existence and validity of said deeds of trust and the

replacement lien and the amount of the indebtedness secured thereby.

2. The lien for delinquent real estate taxes on plaintiffs' 35.32 acre tract of land as of March 10, 1987, in the amount of \$18,132.92 was established by the affidavit of Larry R. Niedergерke.

3. The value of plaintiffs' 35.32 acre tract of land was previously litigated by the parties and determined by this Court to be in the range of \$528,000 to \$563,000, and plaintiffs are barred from relitigating the issue as to the value of said tract of land.

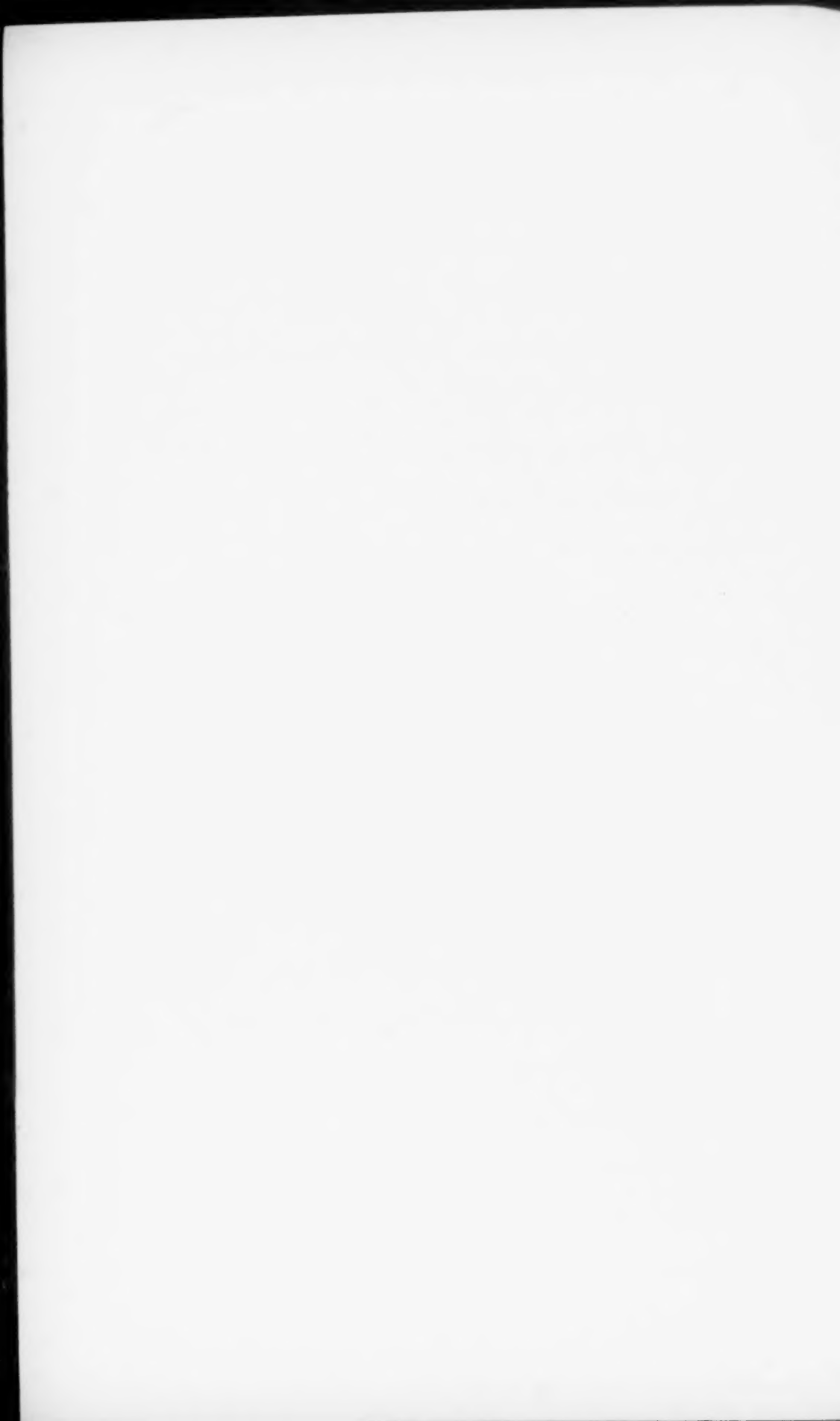
4. As a matter of law, on March 10, 1987, plaintiffs had no equity in said 35.32 acre tract of land.

5. The existence and validity of the deed of trust on plaintiffs' 7.41 acre tract of land in favor of defendant bank and the amount of the indebtedness

secured thereby on March 10, 1987, in the amount of \$36,299.20, were previously litigated by the parties and determined by this Court's Order of October 8, 1986, and plaintiffs' are barred from relitigating any issue as to the existence and validity of said deed of trust and the amount of the indebtedness secured thereby.

6. The value of plaintiffs' 7.41 acre tract of land was previously litigated by the parties and determined by this Court in its Order of October 8, 1986, as having a range of value between \$25,000 and \$28,000, and plaintiffs are barred from relitigating any issue as to the value of said 7.41 acre tract of land, and the same has been established as a matter of law.

7. On March 10, 1987, plaintiffs had no equity in said 7.41 acre tract of



land as a matter of law.

8. Plaintiffs were in default on all of their obligations to defendant bank on March 10, 1987, and the existence of plaintiffs' defaults were previously litigated by the parties and determined by this Court's Order of October 8, 1986, and plaintiffs are therefore barred from relitigating said issues.

9. That defendants complied with all requirements of this Court's Order of October 8, 1986, and acted in good faith in all of its actions taken pursuant to said Order of October 8, 1986, and defendants did not violate the provisions of Sections 443.060 and 443.170 RSMo(1986).

10. That the foreclosure sales conducted by defendants of plaintiffs' 35.32 acre tract and 7.41 acre tract resulted in sales prices within the range



of values established by this Court's Order of October 8, 1986, and in view thereof and in view of this Court's conclusion that plaintiffs had no equity in either of said tracts on March 10, 1987, plaintiffs have suffered no damage as a matter of law, even if plaintiffs' contention that defendants failed to comply with this Court's Order of October 8, 1986, were correct, which it is not.

11. Plaintiffs' claims for attorney's fees in all counts of plaintiffs' petition are without foundation in law or in equity, and plaintiffs are therefore not entitled to an award of attorney's fees as a matter of law.

12. In Count III of plaintiffs' petition seeking to quiet title to plaintiffs' residence against the claims of defendants, plaintiffs allege no



interest in said residence claimed by defendants not already released by defendants prior to the filing of plaintiffs' petition, and there is therefore no interest or claim of interest by defendants in plaintiffs' residence which can be eliminated by the relief sought in Count III of plaintiffs' petition.

13. There is no genuine issue of material fact remaining to be determined in connection with plaintiffs three-count petition, and defendants are entitled to judgment on all three counts of plaintiffs' petition as a matter of law.

Order

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the motion for summary judgment on all counts of plaintiffs' petition filed by defendants First National Bank and Trust Company and Larry



R. Niedergeserke, Trustee, is hereby sustained, and judgment is hereby entered in favor of defendants First National Bank and Trust Company and Larry R. Niedergeserke, Trustee, and against plaintiffs on all counts of plaintiffs' petition, and the costs of this action are hereby taxed against plaintiffs.

/s/
KAREN M. SEE
UNITED STATES BANKRUPTCY JUDGE

ID: 22f

Proposed a Order of findings,
conclusions and Order of
summary judgment submitted by
defendants, as directed at
pre-trial conference on
August 18, 1987

KMS



APPENDIX J



UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 84-01614-C-11

No. 87-4149-CV-C-5

Ad. No. 87-0183-C-1-KMS

Filed April 17, 1987

ROGER P. WILHELM, et al.,

APPELLANTS,

v.

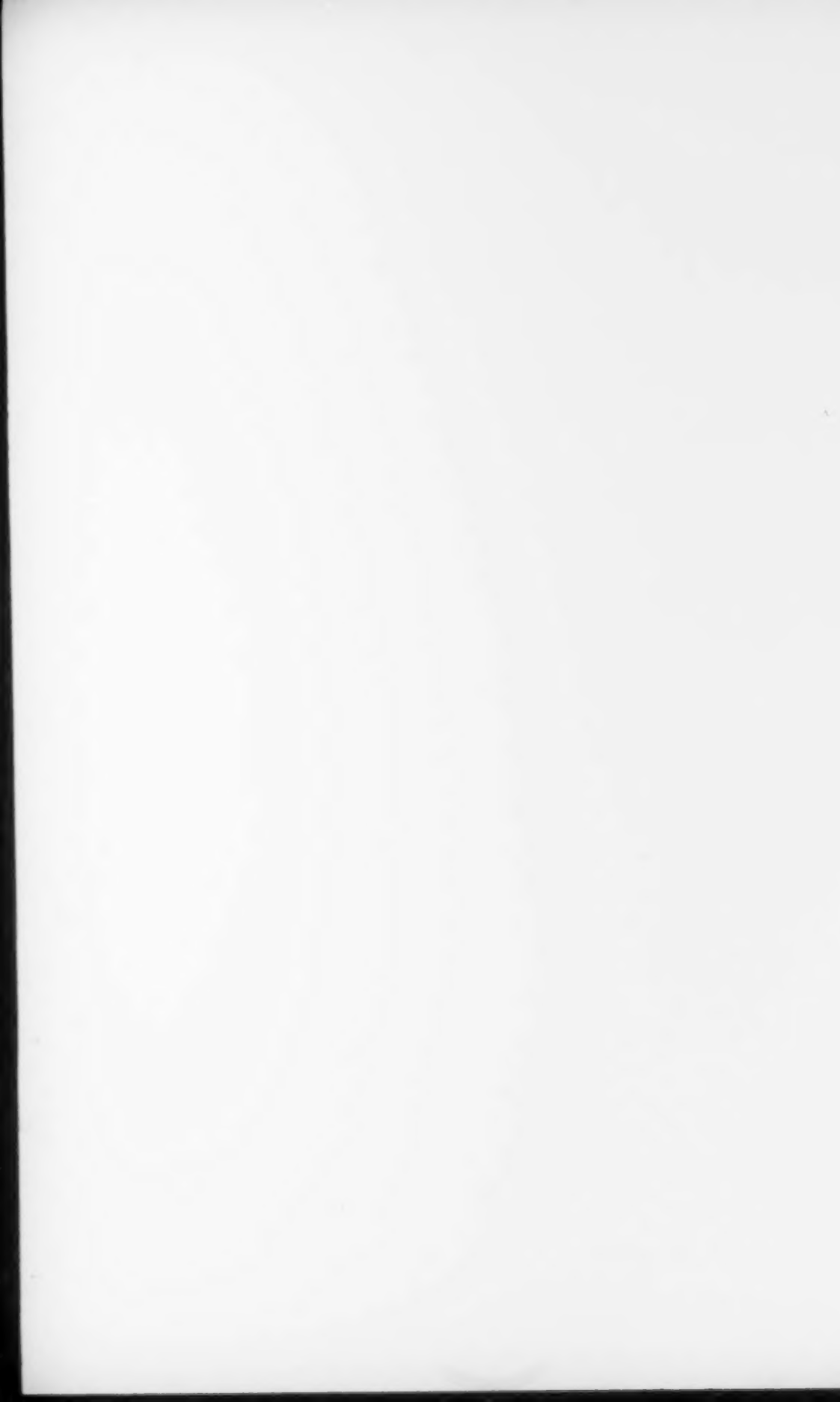
FIRST NATIONAL BANK &

TRUST COMPANY, et al.,

APPELLEES,

ORDER

Pending before the Court are
defendants' First National Bank and Larry
R. Niedergerke's application for removal
to the United States District Court for
the Western District of Missouri and

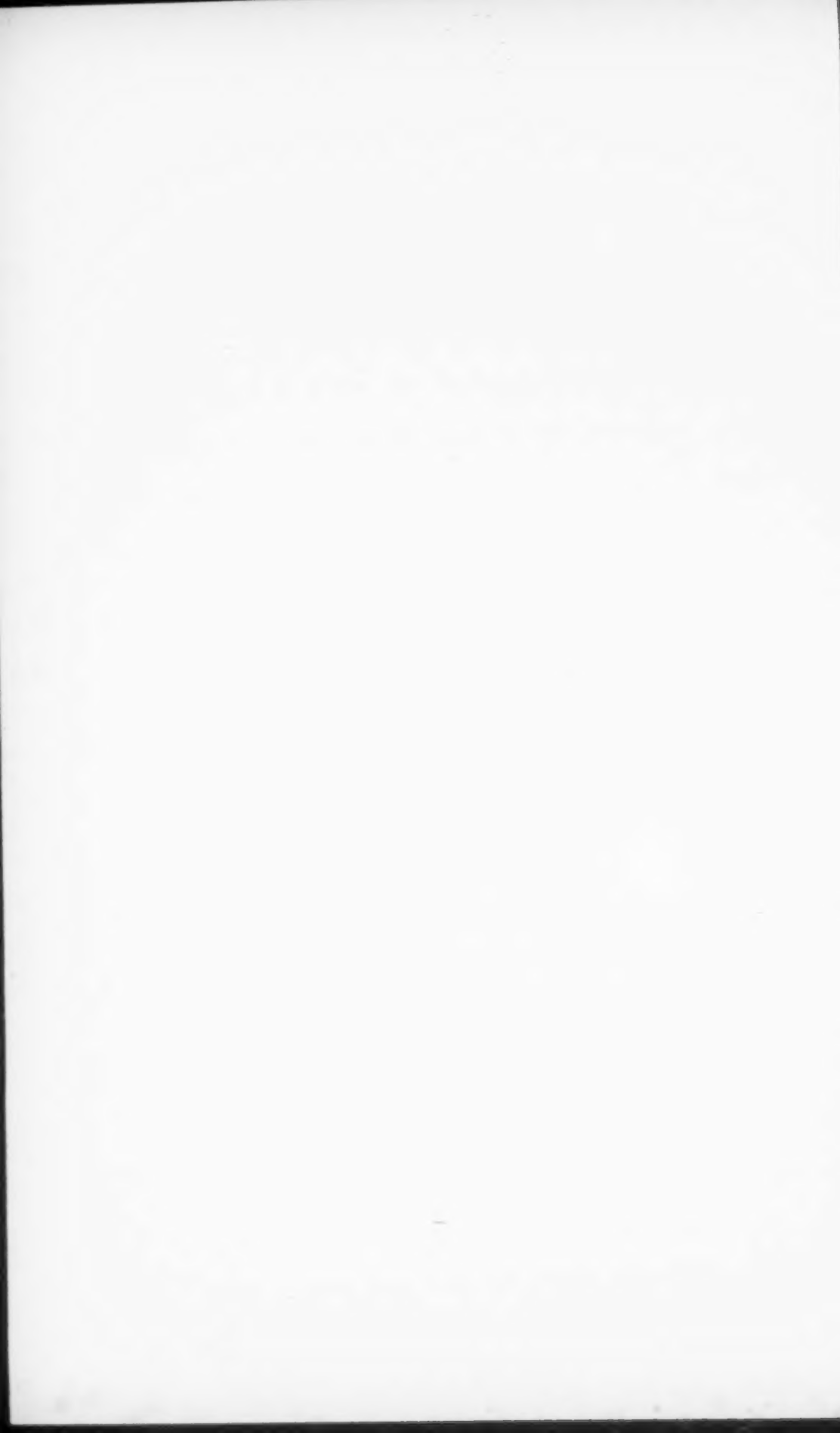


motion to refer the action to the Bankruptcy Court. Defendants assert that this Court has subject matter jurisdiction pursuant to 28 U.S.C. 1334. This section provides that the district courts have original jurisdiction "of all civil proceedings arising under Title 11, or arising in or related to cases under Title 11."

Plaintiffs filed their petition in the Circuit Court of Boone County, Missouri, alleging that the defendants have failed to comply with an order issued by the United States Bankruptcy Court on October 8, 1986, in Case No. 84-01614-C-11 and Adversary number 85-0687-C-11. The Bankruptcy Court has not closed this case, and thus retains jurisdiction over the matter.

Accordingly, it is hereby

ORDERED that this case shall be



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removed to the United States District Court for the Western District of Missouri and referred to the United States Bankruptcy Court, and specifically to the Honorable Karen M. See, Bankruptcy Judge.

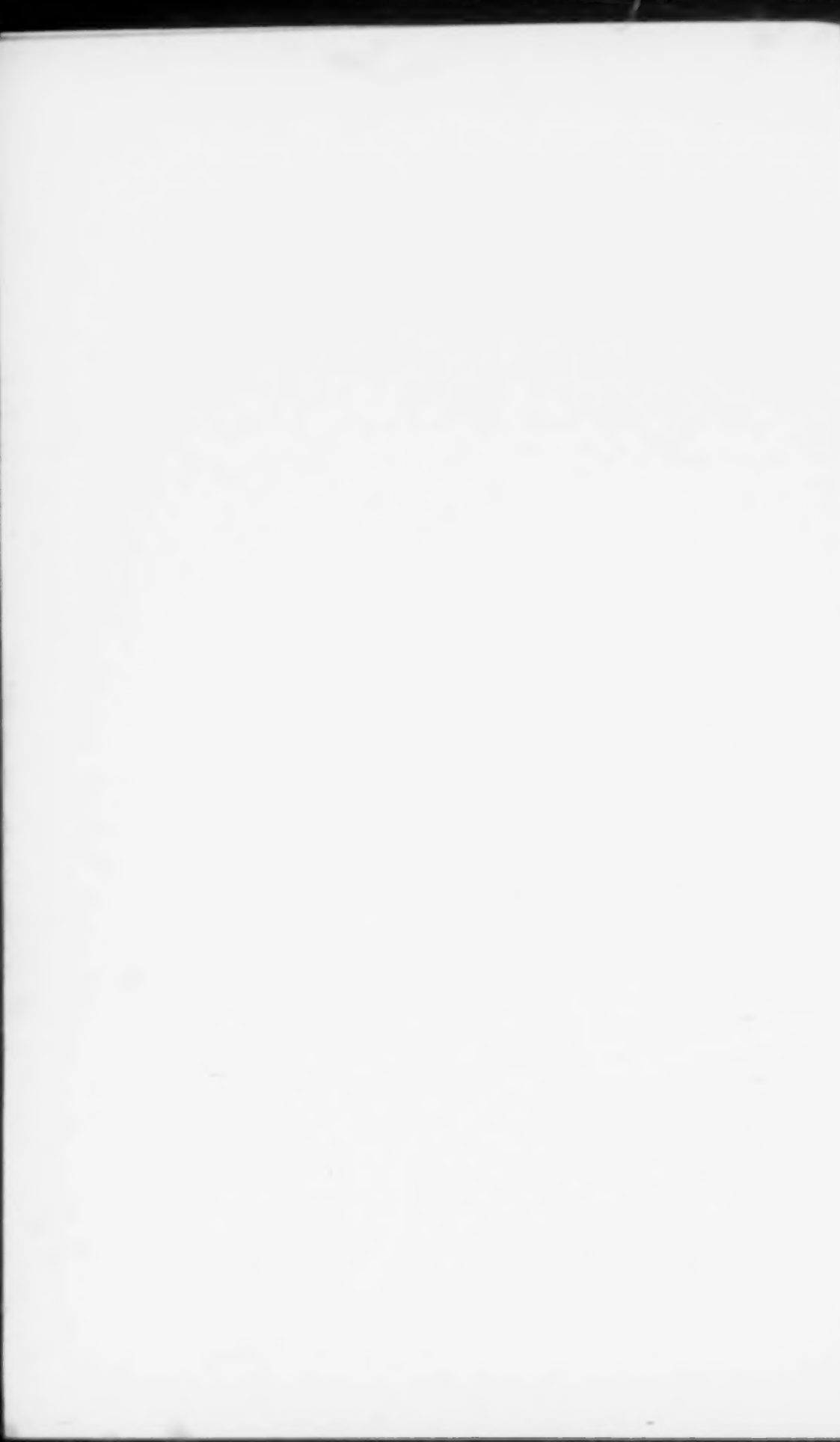
 /s/
SCOTT O. WRIGHT
UNITED STATES DISTRICT JUDGE

April 17, 1987

APPENDIX K

United States Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.



United States Code, Judiciary and
Judicial Procedure, 28 U.S.C.

Section 1654. Appearance personally or
by Counsel.

In all courts of the United States
the parties may plead and conduct their
own cases personally or by counsel as by
the rules of such courts, respectively,
are permitted to manage and conduct
causes therein.